

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
: :
-vs- : Case No. 1:18-cv-950
: :
COX COMMUNICATIONS, INC., et al., :
Defendants. :
: :
-----:

VOLUME 1

TRIAL TRANSCRIPT

December 2, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 of any witness, you may take into consideration the appearance,
2 attitude, and behavior of the witness; the interest of the
3 witness in the outcome of the trial; the relation of the
4 witness to any party in the case; the inclination of the
5 witness to speak truthfully or not; the probability or
6 improbability of the witness's statement, and all other facts
7 and circumstances in evidence. Thus, you may give the
8 testimony of any witness the weight and value that you
9 determine that testimony is entitled to receive.

10 Please pay careful attention to the testimony of the
11 witnesses because contrary to what you've seen on television,
12 it's not possible to call a witness back or to read their
13 testimony back to you after you have begun deliberating.

14 This is a civil case. As I've stated, the plaintiff
15 has the burden of proving this case by what's called a
16 preponderance of the evidence. That means the plaintiff has to
17 produce evidence which considered in light of all the facts,
18 leads you to believe that what the plaintiff claims is more
19 likely true than not. To put it differently, if you were to
20 put the plaintiffs' and defendants' evidence on opposite sides
21 of the scales, plaintiff would have to make the scales tip
22 somewhat on her side. If the plaintiff fails to meet this
23 burden, the verdict must be for the defendant.

24 Those of you who have sat on criminal cases will have
25 heard "proof beyond a reasonable doubt." That requirement does

1 not apply to civil cases; and therefore, you should not be
2 concerned with it.

3 You'll be hearing some different terms, and let me
4 give you a brief sketch of what you'll be hearing about with a
5 little more particularity than you've heard so far in the
6 introductions.

7 A copyright is a set of rights granted by federal law
8 to the owner of an original work of authorship. The owner of a
9 copyright has the exclusive right, among other things, to
10 reproduce the copyrighted work, to prepare derivative works
11 based on the copyrighted work, to distribute copies or phone
12 records of the copyrighted work to the public by sale or other
13 transfer of ownership by rental, lease, or lending.

14 The term "owner" includes the author of the work, the
15 assignee, and any exclusive licensee. In this case, we are
16 focused on two kinds of copyrighted works: sound recordings,
17 which are recorded music; and musical compositions, which
18 include music and lyrics.

19 In this case, plaintiffs claim that Cox is
20 contributorily and vicariously liable for the infringement of
21 10,017 copyrighted works by users of Cox internet service. As
22 I said to you previously, Cox denies that is the case and has
23 asked you to fully consider the defenses that they have.

24 We -- prior to your beginning your service, certain
25 decisions were made by me that plaintiffs have established that

1 they are the owners of the 10,017 copyrighted works in issue --
2 at issue in the case and that the copyright and registration in
3 each of those is valid. They have also -- plaintiffs have also
4 established the knowledge element of contributory infringement;
5 that is, plaintiffs have established that Cox had specific
6 enough knowledge of the infringement occurring on its network
7 that Cox could have done something about it.

8 Direct infringement is -- well, in order to prove
9 contributory or vicarious copyright infringement, plaintiffs
10 must first establish by preponderance of the evidence that the
11 users of Cox's internet service used that service to infringe
12 plaintiffs' copyrighted works.

13 "Contributory infringement" means that a copyright
14 may be infringed by contributory infringing, and with certain
15 exceptions, a person is liable for copyright infringement by
16 another if the person knows or was willfully blind to specific
17 instances of the infringing activity and induces, causes, or
18 materially contributes to that activity.

19 "Vicarious infringement" means that a copyright may
20 be infringed by vicariously infringing. A person is liable for
21 copyright infringement by another person if that person has a
22 financial interest and a right in the ability to supervise the
23 infringing activity, whether or not the person knew of the
24 infringement.

25 You may hear testimony or see documents referring to

1 infringement and infringement notices. As I've just gone over
2 briefly in the description of the contributory and vicarious
3 liability instructions, infringement is an issue of fact that
4 you will ultimately decide based on the facts that you hear,
5 but the word "infringement" and "infringement notices" are
6 words that you'll hear often during the case.

7 Infringement notices are notices sent to Cox that are
8 evidence that you may consider. It's evidence of infringement,
9 but just the fact that there are infringement notices
10 themselves is not alone -- standing alone ultimate proof of
11 infringement without any other evidence. So it's evidence you
12 may consider and give it the weight that you believe that it
13 deserves, but as a matter of law, it does not prove
14 infringement.

15 You'll also hear testimony and see documents that
16 refer to the Digital Millennium Copyright Act, known as the
17 DMCA. The DMCA provides that an internet service provider,
18 like Cox, may have a defense to liability arising from
19 infringement on its network and that there is a defense called
20 a safe harbor defense, which is included in the DMCA in part of
21 the statute. It's not a defense for Cox in this case.
22 However, the failure or the fact that the safe harbor provision
23 does not apply does not bear adversely on the consideration of
24 a defense by the service provider that the service provider's
25 conduct is not infringing under the remainder of the title or

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VOLUME 4 (A.M. Portion)

TRIAL TRANSCRIPT

December 5, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 majority of those are done at a Level 4. And the reason is, is
2 that once you have collected all of the data and information
3 using Level 4 with full verification of the file that is being
4 distributed, it's unnecessary to take any additional steps.
5 You have all the information.

6 You've downloaded the song in its entirety and done a
7 full inspection of that file to determine that it is, in fact,
8 an infringing copy of the song that you were looking for.

9 You've then gone back to the network and had -- you
12:08:33 10 can think of it as direct conversations with the individual
11 peers. And they have told us, we have this file.

12 We then take that hash, match it over here, and we
13 can say, this is definitely the file that we downloaded and
14 expected.

15 And then they're telling us, we have this file and
16 this is how much we're distributing.

17 So at that point you have a full view of the evidence
18 and the data involved. So going beyond that point for notice
19 sending, it would be -- it's just unnecessary.

12:09:07 20 BY MR. OPPENHEIM: (Continuing)

21 Q. Based on the documents that you went through with
22 Mr. Brody, the information you saw, and your past experience,
23 has any of that caused you to believe that the evidence that
24 you collected was in any way inaccurate or inadequate?

25 A. No.

1 MR. OPPENHEIM: No further questions, Your Honor.

2 THE COURT: All right. May this witness be excused?

3 All right. You are excused with our thanks. Please
4 don't discuss the testimony you have given with anyone until
5 our trial is over. All right?

6 THE WITNESS: All right.

7 THE COURT: Have a good day.

8 THE WITNESS: Thank you.

9 NOTE: The witness stood down.

12:10:04 10 THE COURT: All right. Next witness.

11 MR. ZEBRAK: Plaintiffs call Dr. George McCabe.

12 NOTE: The witness is sworn.

13 THE COURT: All right. Good afternoon, Mr. McCabe.
14 Please proceed, Mr. Zebrak.

15 MR. ZEBRAK: Thank you, Your Honor.

16 GEORGE McCABE, called by counsel for the plaintiffs,
17 first being duly sworn, testifies and states:

18 DIRECT EXAMINATION

19 BY MR. ZEBRAK:

12:11:02 20 Q. Good day, Dr. McCabe.

21 A. Good day.

22 Q. For the record, will you please state your full name.

23 A. George McCabe.

24 Q. Where do you work, sir.

25 A. Purdue University.

1 Q. What is your position at Purdue University?

2 A. I'm a professor of statistics.

3 Q. And who retained you in this litigation?

4 A. Plaintiffs' counsel.

5 Q. And at a very high level, could you please tell the jury
6 what you were retained to do.

7 A. Yes. I was asked to complete two analyses.

8 Q. And what were they, at just a high level, sir?

9 A. One was a work in suit analysis. And the second was a
12:11:43 10 repeat infringer analysis.

11 Q. And were you able to form any opinions on those two topics
12 that you were asked to research?

13 A. Yes, I was.

14 Q. Okay. Well, let's explore your background, and then we
15 are going to dive into those analyses you have done.

16 Dr. McCabe, I'm going to hand up to you what has
17 already been marked as PX 526.

18 A. Thank you.

19 Q. Do you recognize that document, sir?

12:12:18 20 A. I do.

21 Q. And what is it?

22 A. It is a document I prepared. It's called a CV, and it
23 basically lists my background and my accomplishments as a
24 statistician.

25 Q. And is it an accurate summary?

1 A. It is.

2 MR. ZEBRAK: Okay. Your Honor, we move its admission
3 as evidence.

4 THE COURT: Any objection?

5 MR. BUCHANAN: No, Your Honor.

6 THE COURT: All right. It's received.

7 MR. ZEBRAK: Thank you, Your Honor.

8 Mr. Duval, if you could publish the document, please.

9 BY MR. ZEBRAK: (Continuing)

12:12:51 10 Q. Dr. McCabe, this is a 38-page document, correct?

11 A. I believe so.

12 Q. So we're not going to go through it in detail. It has
13 been a long day already. But I would just like to spend a few
14 moments on your background before we move into your analysis.

15 Could you start by telling the jury your educational
16 history?

17 A. Yes. I have a bachelor's degree in mathematics from
18 Providence College. And I have a Ph.D. from Columbia
19 University in mathematical statistics.

12:13:22 20 Q. And has your entire career involved statistics?

21 A. Yes, it has.

22 Q. And where have you spent your career after you obtained a
23 Ph.D. in mathematical statistics?

24 A. I came to Purdue University, and I have been there ever
25 since.

1 Q. And for roughly how long has that been that you have been
2 working at Purdue University?

3 A. It will be 50 years in June.

4 Q. All right. Congratulations.

5 A. Thank you.

6 Q. So at a high level, what responsibilities have you had as
7 a professor of statistics at Purdue University?

8 A. My responsibilities basically consist of three tasks,
9 teaching, research, and service. Sometimes service is called
10 engagement.

11 Q. And what has been the subject matter or matters for your
12 teaching?

13 A. I've taught statistics courses, primarily for graduate
14 students, graduate students, both those getting Master's
15 degrees and Ph.D.s in statistics, and also graduate students in
16 other departments who need to use statistics in their own work.

17 Q. And what generally has been the subject of your research?

18 A. Most of my research has been collaborative. So I work
19 with other researchers who have data that needs to be analyzed.
20 And I'm the one who analyzes their data for them.

21 Q. Okay. Well, we'll get into that in a little more detail
22 in a moment. But I believe you said there was a third area?

23 A. Yes, the third area would be engagement. So for most of
24 my career, from 1970 to 2004, I was the director of an
25 organization called the Statistical Consulting Service, which

1 provided help for people who needed to use statistics within
2 the university. That includes faculty, graduate students, and
3 other people who might need the work, but all internal to
4 Purdue.

5 Q. Okay. Let's turn your attention back to your CV, sir.

6 Is that an accurate recitation of your professional
7 experience?

8 A. Yes, it is.

9 Q. And, Mr. Duval, if you could pan down a little lower.

12:15:57 10 And does that list your teaching positions?

11 A. Excuse me?

12 Q. Dr. McCabe, does that list your teaching positions on the
13 first page?

14 A. Yes.

15 Q. And if you could turn to the next page of the document,
16 Mr. Duval, underneath Professional Activities.

17 And does this list your professional activities and
18 other honors and societies you've been a part of throughout
19 your career?

12:16:36 20 A. Yes, it does.

21 Q. And by the way, where have you been a professor besides
22 Purdue in terms of teaching experience?

23 A. Yeah, I hold an adjunct professorship at the National
24 University of Ireland in Galway. I've had sabbaticals at
25 several different places, I think they're listed on the first

1 page. I was at Princeton. I've been at something called
2 CSIRO, which is a research organization in Australia. A
3 visiting position at University of Berne in Switzerland.
4 Several other places for shorter periods of time.

5 Q. Thank you, Dr. McCabe. And I apologize, I asked you
6 before whether this was a 38-page document, but what page,
7 though, does it begin at with its numbering?

8 A. Oh, page 12.

9 Q. And what does it say at the top of this document?

12:17:44 10 A. Appendix 1.

11 Q. And why does it begin -- well, first of all, what was it
12 an appendix to?

13 A. I don't remember.

14 Q. Well, did you provide a written expert report in this
15 matter?

16 A. Yes.

17 Q. And did that include a copy of your CV?

18 A. That's correct.

19 Q. Okay. Okay. Thank you, Dr. McCabe.

12:18:06 20 So have you written any books in the fields of --
21 field of statistics?

22 A. Yes, I have.

23 Q. Mr. Duval, if you could pan over to that.

24 Are those listed here on your CV?

25 A. Yes, they are.

1 Q. Could you tell the jury something about one of your books.

2 A. Yeah. So the first book listed there, actually the first
3 two entries refer to the same book, but we added a different
4 coauthor.

5 So it's a book that's in its ninth edition. The
6 first edition was in 1989, and we're working on the tenth
7 edition now. It's used by a large number of colleges and
8 universities, both in the United States and elsewhere. It's
9 been translated into several foreign languages.

12:18:59 10 Q. Thank you, Dr. McCabe.

11 And, Mr. Duval, if you could turn to the list of
12 publications on what's numbered page 15.

13 Dr. McCabe, is this an accurate list of publications
14 you've authored during your career?

15 A. Yes, it is.

16 Q. And that begins on page 15 and runs all the way through
17 page 30, about 229 of them; is that correct?

18 A. That's correct.

19 Q. And do these all involve the field of statistics?

12:19:26 20 A. Yes, they do.

21 Q. Have you testified as an expert in litigation previously?

22 A. Yes, I have.

23 Q. And in what field?

24 A. In a variety of fields. Initially, in several suits
25 related to equal employment opportunities, salary, promotion,

1 hiring. More recently, I testified in an issue related to the
2 recall of pet foods that were contaminated.

3 Q. Well, putting aside the subject area of the disputes, what
4 was the purpose for your involvement in those litigations in
5 terms of what you brought to them?

6 A. Basically my job was to take data, analyze it, present the
7 results of my analysis to people who needed to use those
8 results.

9 Q. Were you testifying in the field of statistics in those
10 matters?
12:20:35

11 A. Yes.

12 Q. And in -- apart from expert work in litigation, applying
13 statistics and your work at Purdue, did you have other
14 experience in the field of statistics?

15 A. Yes, I have.

16 Q. And could you elaborate on that a little bit.

17 A. Yeah. So some recent work was on women's bone health and
18 osteoporosis, and the use of botanicals like plums and
19 blueberries to prevent bone loss.

12:21:13 20 I've also recently worked on a project on the use of
21 some plants that are grown by Native Americans in North
22 Carolina that have potential benefits for Parkinson's patients
23 to help with their symptoms.

24 Q. I'm sorry. I didn't --

25 A. Yes, and, you know, many other things.

1 Q. And in those matters that you've been referring to, are
2 you the subject area expert, For instance, in Parkinson's
3 disease or in the other issues you were mentioning?

4 A. No, I'm not.

5 Q. And what is the expertise that you brought to bear in
6 those matters?

7 A. It's my background in applied statistics, which I use to
8 work on the data provided by those people.

9 Q. Sure, and -- well, first of all, let me take a step back.
10 You just mentioned applied statistics, and I'm going to get to
11 that. But can you start off and -- you know, many of us --
12 many of us have probably heard the word "statistics" before.

13 But as a -- someone who has taught in the field for a
14 very long time, could you explain what statistics is.

15 A. Yes. The way I view it is I use mathematics and I use
16 computing to study data. The study involves analyses that I
17 perform. And part of my role also is then to take the results
18 of my analyses and present them to people who would need to
19 make decisions. That could be the -- a national workshop or a
12:22:57 20 peer review journal. Or, as today, a jury who might -- needs
21 to make a decision.

22 Q. Have you done work on government panels previously?

23 A. Yes, I have.

24 Q. And in what capacity?

25 A. Again, as a statistician or a statistical expert. I

1 worked on the school lunch program, and then several other
2 issues related to health generally.

3 Q. Thank you, Dr. McCabe. Could you explain why statistics
4 is valuable.

5 A. Yes. I think it's valuable because we need to have a
6 solid foundation for our decisions. So some statistics is
7 labeled as decision analysis.

8 Today, we also hear about evidenced-based medicine
9 that when people are treated, we need to have a sound
10 foundation for that treatment. We need to know that it works,
11 and that process involves statistics.

12 So, in general, there's an idea that statistics is
13 used to assist people in making decisions.

14 Q. And, Dr. McCabe, are you being paid for the time you spend
15 working in this case?

16 A. Yes, I am.

17 Q. And are you being paid by the hour?

18 A. Yes.

19 Q. And how much do you charge per hour?

12:24:34 20 A. \$450.

21 Q. Thank you, Dr. McCabe. Is the payment of your fees in any
22 way dependent upon the substance of whatever opinion or
23 opinions you provide?

24 A. No, it is not.

25 Q. And is the payment of your fees in any way contingent upon

1 the outcome of this case?

2 A. No.

3 Q. And, Dr. McCabe, do you have an understanding of roughly
4 how many hours you've spent working on this case thus far?

5 A. Yes. It's more than 200.

6 Q. Your Honor, I would move -- well, I'm -- let me take one
7 step before I proceed there.

8 Dr. McCabe, you mentioned the term "applied
9 statistics." What is that?

12:25:22 10 A. That involves what I described, that it primarily involves
11 collaboration with other researchers who have data that needs
12 what I am able to do for them.

13 MR. ZEBRAK: Your Honor, I would offer Dr. McCabe as
14 an expert in the field of statistics, and allow him to testify
15 as such.

16 THE COURT: All right. Any objection?

17 MR. BUCHANAN: No objection.

18 THE COURT: All right. He will be received for that
19 purpose.

12:25:47 20 BY MR. ZEBRAK: (Continuing)

21 Q. Dr. McCabe, just to be clear, are you providing a legal
22 opinion here today?

23 A. No.

24 Q. Are you an expert in the field of copyright law?

25 A. I am not.

1 Q. Are you an expert in the field of -- or are you an expert
2 in peer-to-peer technology?

3 A. No.

4 Q. But your experience, statisticians are oftentimes retained
5 to apply their statistical expertise on data in which they're
6 not an expert in, you know, the content of that data; is that
7 correct?

8 MR. BUCHANAN: Leading, Your Honor.

9 THE COURT: I'll allow it for --

12:26:25 10 A. That's correct.

11 BY MR. ZEBRAK: (Continuing)

12 Q. Dr. McCabe, did you make any assumptions about any data
13 you reviewed as part of your analysis in this case?

14 A. Yes, I did.

15 Q. And why is that?

16 A. In order to do my analysis, the starting point was
17 collection of data sets. And I assumed that the data speak for
18 themselves, that they -- I took them at face value. I did not
19 collect the data or verify or establish anything else about
12:26:57 20 them. I take them as given at face value.

21 Q. In your experience, is it unusual for you as a
22 statistician to take the data that you're collecting and
23 analyzing at face value?

24 A. That would be the usual standard, yes.

25 Q. Dr. McCabe, do you have any reason to believe that the

1 data that you were given for purposes of your analysis in this
2 case is not reliable?

3 MR. BUCHANAN: Objection, Your Honor. He just said
4 he assumed it was accurate.

5 THE COURT: Yeah, sustained.

6 MR. ZEBRAK: We don't need to -- we can just move on.

7 THE COURT: And we don't need -- you know, counsel
8 have all been making comments about matters today. Let's just
9 ask our questions and not comment on answers or speak back and
10 forth to each other. It is confusing to the jury.

11 Please. Thank you.

12 MR. ZEBRAK: Yes, Your Honor. We're moving right on.

13 BY MR. ZEBRAK: (Continuing)

14 Q. Dr. McCabe, did you prepare any slides to assist you in
15 your testimony today?

16 A. I did.

17 Q. And are those demonstrative slides an accurate summary of
18 your analysis in this case?

19 A. They are.

12:28:17 20 MR. ZEBRAK: Okay. Your Honor, permission to publish
21 the slides.

22 THE COURT: Any objection?

23 MR. BUCHANAN: No, Your Honor.

24 THE COURT: All right, go ahead.

25 BY MR. ZEBRAK: (Continuing)

1 Q. Dr. McCabe, let's turn to the first slide. I believe you
2 said you did -- you had two assignments in this case, a works
3 in suit analysis and a repeat infringer analysis, correct?

4 A. That's correct.

5 Q. Okay. So let's review assignment one, the works in suit
6 analysis. Would you explain to the jury what your assignment
7 was with respect to the works in suit analysis.

8 A. Yeah, so the first line below the title defines the scope
9 of my analysis. Sometimes we -- or I would call that a frame,
10 it's a statistical term. So the frame here is what are called
11 the works in suit. And there are 10,017 of those works.

12 There are four icons below that. And these are the
13 requirements that I used or applied to accomplish the works in
14 suit task.

15 So the first requirement is that the work -- and this
16 is analysis about the works in suit. Again, it's the 10,017
17 works that we're talking about. So that work must in an
18 infringement notice -- an infringement notice during the claim
19 period.

12:29:54 20 The second is that the work in suit should be in a
21 notice that is the third or later notice for a particular
22 subscriber.

23 In other words, I labeled the notices as a first, a
24 second, a third, et cetera. So I only looked at third or later
25 notices.

1 Next, the infringing notice must contain the work in
2 suit.

3 And the fourth requirement is that the infringing
4 file is on a hard drive that was created by MarkMonitor.

5 Q. Dr. McCabe, I would like to draw your attention to the
6 third bullet. A moment ago I believe you said the infringed --
7 well, could you explain what that third bullet is in a little
8 more detail.

9 A. Yes. So the notice contains information. And the
12:30:54 10 information, depending upon the protocol, points either to one
11 work in suit or it can -- in the case of BitTorrent, it can
12 refer to a collection of works.

13 Q. What is the significance to the reference to "infringing
14 file" in that third bullet?

15 A. The infringing file is part of the notice. And that
16 points to -- through these hashes, it points -- it gets us to
17 the works in suit.

18 Q. Do you have an understanding as to whether the infringing
19 file is identified in the notice?

12:31:34 20 A. Yes, it is.

21 Q. And by the way, when we talk about notices, what are we
22 referring to here?

23 A. They are the e-mails sent by MarkMonitor to Cox.

24 Q. Okay. And were you able to form any -- and, first of all,
25 you said that you're not providing any -- you're not testifying

1 as a legal expert today, correct?

2 A. That's correct.

3 Q. So these requirements that you applied here, where did you
4 come up with those requirements?

5 A. In consultation with plaintiffs' counsel.

6 Q. Okay. Who set these requirements?

7 A. These were set as part of my assignment, if you will.

8 Q. Thank you, Dr. McCabe. Let's turn to your conclusions.

9 Were you able to form any conclusions with respect to
12:32:24 10 your works in suit analysis?

11 A. Yes.

12 Q. And did you prepare a slide to overview those conclusions?

13 A. Yes.

14 Q. With respect to the top bar labeled Findings, would you
15 please explain to the jury what your overall findings are?

16 A. Yes. So that top line is a summary of my findings that
17 all of the 10,017 works in suit were qualified.

18 In other words, they satisfied the four requirements
19 that are described on the previous slide and are illustrated on
12:33:02 20 this slide.

21 Q. And could you walk us through this slide one component at
22 a time. What's the checked box next to Claim Period signify?

23 A. So that means that -- if you recall, the previous slide
24 said the first requirement was that the work in suit should
25 appear in a notice during the claim period.

1 So on this slide, the claim period is denoted or
2 described by the yellow bar at the top. It starts February 1,
3 2013, and ends November 26, 2014.

4 And the checkmark means that all of the 10,017 works
5 in suit did correspond to a notice during this claims period.

6 Q. Was the claim period the same claim period for every
7 single plaintiff group in this case?

8 A. No. There is a note below the bars for the years that --
9 for the Sony ATM/EMI claims, the start of the claim period was
12:34:24 10 August 1, 2013, rather than February 1, 2013. But that period
11 was the same, the ending date of the claims period for Sony
12 ATM/EMI was the same as for all the others.

13 Q. And, Dr. McCabe, would you briefly walk the jury through
14 the remaining three checked boxes on this slide.

15 A. Yes. So the second is that -- this issue of the third or
16 later notice for a particular subscriber. So that was
17 satisfied for all of the 10,017 works.

18 That the infringing file in the notice contains the
19 work in suit.

12:35:11 20 And that there is a copy of the work on a hard drive
21 created by MarkMonitor.

22 So all of these -- the four requirements are
23 satisfied. And the term I'm using is that means those works in
24 suit were qualified.

25 Q. Dr. McCabe, what data sources did you use for your

1 analysis in this case?

2 A. Yes, I think I prepared a slide for that. That should be
3 the next one.

4 Q. Or actually, Dr. McCabe, let me ask you a question. A
5 moment ago when you were explaining each of the four
6 requirements for your analyses were satisfied, you used the
7 term "qualified."

8 What does that mean?

9 A. It basically means that the work in suit is connected to a
10 notice. So we could view it the other way around. You start
11 with the notice, it points to the work in suit. So there is a
12 direct connection between those two.

13 And that's what I'm calling qualified, that I can
14 draw the link from the notice to the work in suit.

15 Q. Okay. Well, let's turn back to your data sources, and I
16 can ask you a few questions about that.

17 So what is being depicted in the left column with
18 respect to data sources?

19 A. The left column describes the source of the data sets. So
12:37:04 20 there are three sources, MarkMonitor, Cox, and the plaintiffs.

21 Q. And what data from MarkMonitor was within your analysis in
22 this matter?

23 A. So MarkMonitor is the top data source there. And there
24 are three files listed to the right. The first is the notices
25 or the -- actually, I didn't have the notices, but I had a file

1 that lists the notices and the information contained in each
2 notice. So all that -- these are all data files that I had.

3 So there is a file for notices from MarkMonitor.
4 There is a file for the downloads that MarkMonitor downloaded.
5 And there is a file from MarkMonitor about the Audible Magic
6 procedure or connections to go from hashes to works.

7 Q. And what is depicted with respect to Cox in terms of data
8 from Cox that you considered within your analysis?

9 A. So Cox also provided three data sets. The first one
10 listed there is subscriber identification. So the Cox CATS
11 system has identifiers for subscribers. It was necessary to
12 have that information to be able to perform my analysis.

13 So it's the file itself connected subscriber IDs with
14 notices.

15 The second file is what I have called the ticket
16 file. It's the large file that contains the tickets that Cox
17 recorded in their CATS system.

18 And the third is a file that identifies Cox
19 subscribers as -- I used it to distinguish residential from
12:39:17 20 business subscribers.

21 Q. And when you say the third file, was that the billing
22 information file?

23 A. I am sorry, the billing information file, yes.

24 Q. And, finally, to the right of plaintiffs, there is an
25 Exhibit A and B. What are those two files?

1 A. Right. These two files comprise the works in suit. So
2 the first is a collection of sound recordings, and the second
3 is list of compositions.

4 Q. And I apologize, Dr. McCabe, but would you please
5 elaborate slightly on looking back to the MarkMonitor box, what
6 the middle file is that says Downloads.

7 A. The downloads are the works that -- or it's a list of the
8 works that are on -- that have been downloaded and are on the
9 MarkMonitor generated drive that they prepared.

12:40:16 10 Q. I see. Okay. Thank you, Dr. McCabe.

11 And what did you do with these data sources once you
12 received them?

13 A. My first task was to connect them. And I think the next
14 slide gives an idea of what that involved.

15 Q. And before we turn to that slide, Dr. McCabe, what does it
16 mean to connect data sources generally?

17 A. What that involved was to take -- in each step take two
18 data sets and combine the information into a single data set.
19 So there needs to be a connector to track the information that
12:41:02 20 is shared. There needs to be some sharing of information to
21 merge the files together, basically.

22 Q. And what benefit, if any, is there in being able to
23 connect data sets with respect to then analyzing data?

24 A. That was the way that I performed my analysis, it was
25 necessary to make those connections. In other words, to go

1 from the top notices all the way to the bottom recordings, I
2 had to make a series of connections all the way through.

3 Q. Well, let's look at the next slide then.

4 So these are the data sources that you considered
5 that we just reviewed on the last slide, correct?

6 A. That's correct.

7 Q. Okay. And can you give us some examples of how you
8 connected -- I know it has been a long day already. We are not
9 going to go through all of these. But if you could connect
10 some of these for the jury.

11 A. Yes. So the simplest one would be the one across the top
12 with the three Cox files. So there is a variable or an
13 identifier, it is a piece of the file that identifies a Cox
14 subscriber, and it's called an ICOMS ID.

15 So that identifier is in the left most data file,
16 which is the copy infringement tickets. That's the large
17 ticket file.

18 It's also in the billing information. And the
19 connector is in this subscriber ID, which is the way to connect
20 those three files -- I am sorry -- it's the ICOMS ID. Yeah.

21 Q. Okay. And so what is the purpose of these lines that we
22 see on this? So prior to the animation coming up, we just have
23 your data sources.

24 What's the significance of the lines that then
25 appears when the animation pops up?

1 A. So those are the -- those identify the variable that is
2 used to connect the data sets. Basically, we're merging data
3 sets to combine -- to create a new file that combines the
4 information for the two source files.

5 Q. And then, Dr. McCabe, once you've -- and were you able to
6 make a connection between these data sources to go from the top
7 to the bottom as you described it?

8 A. So going from, let's say, the Cox domain to the
9 MarkMonitor domain, we have notice IDs and subscriber IDs. So
10 there -- that's the way to connect the notices with the
11 subscribers.

12 The notices themselves do not contain an identifier
13 for the subscriber. So we obtained a subscriber ID file from
14 Cox to attach that identifier to the notices.

15 Q. But once you connected all these different data sources,
16 what did you then do with respect to analyzing the data?

17 A. So the analysis is basically to connect the notices with
18 the works in suit. And that's the bottom line of what -- of
19 what I did. And to satisfy these four criteria.

12:44:42 20 Q. Okay. And just before we move on to your second
21 assignment in terms of the repeat infringer analysis, can you
22 remind the jury of your overall finding with respect to the
23 works in suit.

24 A. Yes. My overall finding is at the top of this slide, that
25 all 10,017 works in suit did correspond to a work that

1 satisfied these four requirements.

2 Q. Okay. Let's turn to your second assignment, which you
3 referred to as a repeat infringer analysis.

4 Would you explain to the jury at a high level what
5 your repeat infringer analysis involved.

6 A. Yes. So in contrast to the first task, which was about
7 works or works in suit, this task was about Cox subscribers.
8 In particular, as indicated on the slide, the frame here, if
9 you will, is the 57,600 subscribers that were reported by
10 MarkMonitor. So that's the frame.

11 And again, the analysis is an analysis of those
12 57,600 subscribers and their repeats. So I created a file and
13 counted infringement No. 1, infringement No. 2, et cetera, to
14 be able to look at the repeat pattern of infringements.

15 Q. And are these -- what's the significance of these items
16 that appear below the frame that you defined of the 57,600
17 subscribers reported by MarkMonitor?

18 A. So my task was to describe and analyze the patterns of
19 repeat infringers. That's what I did. So the five icons there
20 indicate five summaries that I generated as part of my
21 analysis. The first is what's the distribution of tickets,
22 meaning how many had one ticket, how many had two tickets,
23 et cetera.

24 I looked at the entries that identified subscriber
25 terminations in the Cox ticket data.

1 I think I mentioned above, the distinction between
2 residential versus business subscribers.

3 And there are also in the Cox data, there were
4 tickets for notices from other rights holders.

5 So again, these are still the 57,600 subscribers
6 reported by MarkMonitor, but my analysis included notices or
7 tickets generated by notices from other rights holders. And it
8 also included, as noted on the last entry, it included tickets
9 that occurred or that were generated before the claim period.

12:48:03 10 Q. Dr. McCabe, you've been discussing use of tickets for this
11 repeat infringer analysis. Whose data is the ticket data that
12 you're analyzing?

13 A. The ticket data is the Cox CATS data.

14 Q. And so, these are Cox's records as to the subscribers who
15 are the subject of MarkMonitor notices; is that correct?

16 A. That's correct.

17 Q. Okay. And let's take these one by one. Let's first look
18 at your slide on distribution of tickets.

19 So would you walk the jury through this slide, first
12:48:47 20 starting at the -- where it appears in black: All tickets.

21 A. So again, that's the frame I use. It's the 57,600
22 subscribers. And I looked at all tickets for those that were
23 contained in the -- what I call the ticket data, the Cox data.

24 The red bar at the top indicates the range of dates
25 that are included in that ticket data file that I received from

1 Cox.

2 So the start date is January 1, 2012, and the end
3 date is December 31, 2014. So there are three years, 2012, '13
4 and '14 that are covered by this analysis.

5 Q. Dr. McCabe, let me ask you a question, if I could draw
6 your attention in blue where it says: Cox Copyright
7 Infringement Tickets.

8 Do you see that?

9 A. I do.

12:49:44 10 Q. How does that relate to all tickets on the top? And
11 I'm sorry, that was a clumsy question.

12 When you say you considered all tickets for this pool
13 of 57,600 subscribers reported by MarkMonitor --

14 A. Yes.

15 Q. -- is it the case that this includes copyright
16 infringement tickets generated from notices from others in
17 addition to MarkMonitor? Is that the --

18 A. That's correct, yes.

19 Q. Okay. And let's take it one frame at a time.

12:50:23 20 So what's being depicted in the column that says 3+
21 with the number beneath it?

22 A. So again, there are -- there's a picture, three or more,
23 and -- there's a picture of three, sorry. And the 3+ means
24 that I counted the number of subscribers that had three or more
25 tickets. And that number is 31,628, given in black below the

1 3+ and the three icons.

2 So of the 57,600 subscribers that are the frame for
3 my analysis, 31,628 had three or more tickets.

4 Q. Okay. And what about the -- if you could move to the next
5 column. Is the idea there that the top bar represents the
6 number of copyright infringement tickets for the 16,818 Cox
7 subscribers depicted beneath it?

8 A. That's correct. So there is -- that's the number, 16,818
9 is the number of subscribers who had six or more tickets.

12:51:43 10 Q. And, Dr. McCabe, is a copyright infringement ticket --
11 what's your understanding of how that relates to an
12 infringement notice?

13 A. My understanding is that when MarkMonitor sent an
14 e-mail -- an e-mail notice, if you will, to the Cox system,
15 that caused a ticket to be generated.

16 Q. Do you know what happens if Cox receives multiple
17 infringement tickets for the same subscriber -- strike that.

18 Do you know what happens when -- in a scenario where
19 Cox receives multiple infringement notices from different
12:52:24 20 parties on a single day for a single subscriber?

21 MR. BUCHANAN: I'm just going to object. I don't
22 think he has been offered as an expert on the system, just on
23 data.

24 THE COURT: All right. Lay a foundation if you want
25 him to testify to that. Sustained.

1 MR. ZEBRAK: Sure.

2 BY MR. ZEBRAK: (Continuing)

3 Q. Dr. McCabe, what's your understanding of what a copyright
4 infringement ticket is?

5 A. My understanding is that it is generated by a notice. I
6 believe it can correspond to more than one notice, but I don't
7 recall a lot of details about that part of the structure.

8 In terms of the data, I treated the entry of a ticket
9 as the basic piece of information that I use to compute this
10 distribution.

11 Q. So this repeat infringer analysis is an analysis of Cox's
12 records? It's its ticket data, however Cox generates that
13 data; is that correct?

14 A. That's correct.

15 Q. Okay. And can you walk the jury through the successive
16 three columns, starting at 10+?

17 A. So for ten or more tickets, we had 8,495 subscribers. For
18 13 or more tickets, there were 5,120 subscribers. And for 14
19 or more tickets, there were 4,404 tickets.

12:54:16 20 Q. Okay. And, Dr. McCabe, I believe you indicated there were
21 a total of five characteristics of these 57,600 subscribers you
22 looked at?

23 A. That's correct.

24 Q. And we just reviewed the first one, distribution of
25 tickets; is that correct?

1 A. Yes.

2 Q. Okay. Let's turn your attention to the next one. What --
3 could you walk the jury through what -- through your analysis
4 that's depicted in this slide.

5 A. Yes. As I mentioned before, I looked at the Cox data and
6 looked at the entries corresponded to terminations. When I did
7 that, I found 13 terminations. So this graphic is an attempt
8 to make a picture out of that finding.

9 So again, we start with the frame, if you will, the
10 57,600 subscribers, and that's the bar on the left-hand side.

11 If you look on the right-hand side, it's a blown-up
12 version of the upper right-hand corner square for the 57,600.
13 And the squares colored yellow with the little icons
14 representing people, they represent subscribers. Actually,
15 those are the 13.

16 Q. And what was the time frame for which you had this Cox
17 ticket data that's the subject of your repeat infringer
18 analysis?

19 A. It's the time frame for the ticket data that we had, which
20 was the three years, 2012, '13 and '14.

21 Q. So turning your attention back to the slide of the
22 distribution of tickets, in -- these don't consider whatever
23 notices, if any, these 57,600 Cox subscribers may have received
24 prior to 2012; is that correct?

25 A. Could you repeat that? I didn't --

1 Q. Sure. If any of these 57,600 Cox subscribers had
2 copyright infringement tickets prior to January 1, 2012, would
3 that be depicted here in your analysis?

4 A. Prior to January 1, 2012?

5 Q. Yes.

6 A. Yeah, they would be included.

7 Q. Well, but you just said a moment ago that your -- that the
8 data only is for 2012 to '14, correct?

9 A. I'm sorry, yes. I had it reversed.

12:56:55 10 So it does not include data before -- the Cox data
11 that we have starts 2012, ends 2014, those entire three years.
12 And anything outside that range, I did not have data for those.

13 Q. Okay. So let's move on to your -- and so, relating these
14 two slides, out of the 57,600, the Cox ticket data showed you
15 that Cox terminated only 13 of that pool; is that correct?

16 A. That's what the data say, yes.

17 Q. And that's -- and the ticket distribution includes those
18 that received ten or more, 13 or more, 14, correct?

19 A. That's correct.

12:57:46 20 Q. So -- okay. So out of the -- let's turn to your next --
21 the third of your five areas.

22 THE COURT: You know, what don't we stop here before
23 you get into the third area.

24 MR. ZEBRAK: Oh, sure.

25 THE COURT: We're almost at 1 o'clock.

1 MR. ZEBRAK: Yes, sir.

2 THE COURT: So let's take our lunch break. We'll
3 come back at 2 o'clock. All right.

4 Thank you, you're excused.

5 NOTE: At this point the jury leaves the courtroom;
6 whereupon the case continues as follows:

7 JURY OUT

8 THE COURT: All right. So anything before we recess?
9 Okay. Then we have a --

12:58:56 10 MS. LEIDEN: Sorry, Your Honor.

11 THE COURT: Yes.

12 MS. LEIDEN: One issue from defendants, briefly.

13 Plaintiffs intend to call by video deposition Jason
14 Zabek. And depending on witnesses that go today, that video
15 may be at least started today.

16 The parties have exchanged designations and various
17 objections, and we have -- we are going to try to work out any
18 remaining objections that we have prior to the video
19 deposition. But we wanted to raise to your attention that
12:59:24 20 there may be remaining objections to deposition testimony and
21 exhibits that we will need to resolve with Your Honor before
22 the video begins to be played.

23 THE COURT: Okay. So any of the text of the video
24 that you still object to, get it to me as soon as you can and
25 give me an opportunity to look at it and rule on it. And if

1 you need -- if you want to be able to argue it, I'll give you a
2 brief time to do that.

3 And for the other deposition designations that are
4 still being worked on, try and get them to me the night before
5 so that you have an opportunity to splice and put them together
6 not at the last -- they're videos, right? They're not just
7 transcripts?

8 MR. OPPENHEIM: They are, Your Honor. And this, in
9 part, is plaintiffs' fault because last night we tried to cut
10 back and shorten that video because it's far too long for, I
11 think, anybody's desire.

12 So that's why we didn't get it to you in advance.
13 Our apologies.

14 THE COURT: Okay. All right. So -- yes, sir.

15 MR. ELKIN: A related point, Your Honor, is that
16 currently as it stands, it's about four hours. And I'm not
17 being critical of it. But all I'm suggesting is the following.
18 We have from Atlanta and from Hampton Roads, I think, we've got
19 Ms. Trickey, Mr. Carothers --

20 THE COURT: Mr. Cadenhead.

21 MR. ELKIN: -- Mr. Vredenburg. And if it's going to
22 be a four-hour video and these witnesses are already here --
23 and I'm mindful of the fact that it's their strategy, they want
24 to put the witnesses in their order, and I respect that, but if
25 these witnesses are already here out of town. I would just ask

1 the Court to consider how that -- how we proceed.

2 THE COURT: Yeah. If putting this video on before
3 those witnesses involves having that jury sit and twiddle their
4 thumbs while we're going through objections, then I'm not going
5 to permit it. We're going to do it with live witnesses.

6 And after they're done, after we send the jury home,
7 we can go through the deposition designation objections.

8 This case has been going on a long time, and the last
9 thing that I'm going to permit is us to have the jury sitting
10 around while we're yakking about whether something is
11 objectionable.

12 So thank you for bringing that to my attention.

13 All right. So I have a plea. The defendant is in
14 custody. So the, you know, pencils and that kind of stuff
15 probably aren't a good idea.

16 All right. We're in recess.

17 NOTE: The morning portion of the case on December 5,
18 2019, is concluded.

19 CERTIFICATE OF COURT REPORTERS

20
21 We certify that the foregoing is a true and
22 accurate transcription of our stenographic notes.

23 /s/ Norman B. Linnell
24 Norman B. Linnell, RPR, CM, VCE, FCRR

25 /s/ Anneliese J. Thomson
Anneliese J. Thomson, RDR, CRR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

VOLUME 4 (P.M. Portion)

TRIAL TRANSCRIPT

December 5, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

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1 A F T E R N O O N S E S S I O N

2 NOTE: The December 2, 2019, afternoon portion of the
3 case begins in the absence of the jury as follows:

4 JURY OUT

5 THE COURT: All right. Ready for our jury?

6 Okay. Joe, let's get our jury, please.

7 NOTE: At this point, the jury returns to the
8 courtroom; whereupon, the case continues as follows:

9 JURY IN

10 THE COURT: All right. Please have a seat.

11 GEORGE P. McCABE, PH.D., PLAINTIFFS' WITNESS,

12 PREVIOUSLY SWORN, RESUMED

13 THE COURT: All right. Let's continue, please.

14 MR. ZEBRAK: Thank you, Your Honor.

15 DIRECT EXAMINATION (Cont'd.)

16 BY MR. ZEBRAK:

17 Q. Good afternoon, Dr. McCabe. Right before we broke for
18 lunch, you were in -- we were discussing your assignment to the
19 repeat infringer analysis, and I believe we were just about to
20 jump into this slide. Would you please explain to the jury
21 what's being depicted in this slide?

22 A. Yes. So for this slide, I classified the, the 57,600
23 subscribers, which I'm calling the frame. I classified them as
24 residential subscribers or business subscribers. So there were
25 54,732 residential subscribers, and there were 2,868 business

1 subscribers.

2 The pie chart depicts that -- those numbers expressed
3 as percents. So 95 percent of the subscribers were
4 residential, and 5 percent were business.

5 Q. And, Dr. McCabe, what is the source of the data records
6 you used to assess the breakdown of the Cox subscribers who
7 were the subject of MarkMonitor's notices?

8 A. Could we go back to the slide that has the datasets on it?

9 Q. Sure. That would be -- please let me know when I'm there.

10 A. Yeah, that's fine. So it's along the top. So it's Cox
11 data, and it's the third file, which is -- in this display is
12 called billing information. So billing information is the
13 connector for the defining residential versus business.

14 Q. I'm going to, if it's okay, bring us back to the slide we
15 were just on. Is there anything else about this slide that --

16 A. I think that's it. 95 percent versus 5 percent, yeah.

17 Q. Okay. And would you please explain to the jury what's
18 being depicted in this slide with respect to your repeat
19 offender analysis?

20 A. Yes. So here I looked at the -- excuse me -- I looked at
21 the, the source of the, of the notice. So the notices that I
22 have recorded from, as infringers -- I'm sorry -- the notices
23 from going back to MarkMonitor, for those rights holders, my
24 understanding is they're the plaintiffs in this suit, but the
25 Cox file also contains notices from other rights holders.

1 So basically here what I did was look again at
2 subscribers, so it's a subscriber analysis, and
3 17,729 subscribers had notices from other rights holders.

4 So, again, 17,729 out of 57,600, that's depicted in
5 the pie chart as 30.8 percent. So 30.8 percent of the
6 subscribers had notices from other rights holders.

7 Q. So out of the 57,600 Cox subscribers reported in
8 MarkMonitor's notices, a little less than a third of them were
9 also the subject of notices that led to tickets as reported by
10 the rights holders? Is that what you're saying?

11 A. That's correct.

12 Q. Okay. And is this also based on Cox's records, the ticket
13 data that you described earlier?

14 A. That's correct.

15 Q. Okay. Looking at the next slide you have here, would you
16 explain to the jury what the purpose of this slide is?

17 A. Yeah. The purpose is to depict the analysis that I did
18 related to claims -- or notices, sorry, notices before the
19 claim period. So if you look at the timeline on the bottom in
20 yellow there, the bar with arrows at the end, that's the
21 definition of a claim period, February 1, 2013, to November 26,
22 2014, with a caveat that there's a different start time for the
23 one plaintiff.

24 Superimposed on that in the gray is the time frame
25 for the Cox ticket data. So for the Cox ticket data, that

1 spans the years 2012, '13, and '14. So it overlaps -- or the
2 claims period is a subset of that time frame.

3 So if we look at the, the notices before the
4 beginning of the claim period, that is, before February 1,
5 2013, there were 13,441 subscribers who had one or more tickets
6 in that before claim period, the period to the, the left of the
7 center cut in the slide.

8 Q. Dr. McCabe, I'd like to ask you a question that contrasts
9 this with the works in suit analysis, and looking back at the,
10 if you wouldn't mind going back to the original slide, the
11 works in suit analysis was a third or later notice for a
12 subscriber in the claim period; is that correct?

13 A. That's correct.

14 Q. Okay. But then looking -- and the repeat infringer
15 analysis is the who, it's the people; is that correct?

16 A. The subscribers, yes.

17 Q. Okay. Well -- and then -- oops.

18 And so this -- is there anything else about this
19 slide that you'd like to explain?

20 A. No. But just as, as you mentioned or as I mentioned, it
21 depicts the contrast between the claims period and the larger
22 period of time covered by the Cox data that I used for the
23 repeat infringer analysis.

24 Q. So the 23.3 percent, is it correct that Cox received
25 notices from them both during the claim period and prior to the

1 period? Is that essentially what this slide is showing?

2 MR. BUCHANAN: Asked and answered and leading.

3 THE COURT: All right. I'll allow the question.

4 BY MR. ZEBRAK:

5 Q. Would you like me to repeat the question?

6 THE COURT: Well, just ask him: What does this data
7 depict?

8 MR. ZEBRAK: Sure.

9 THE WITNESS: So, yes. It's -- again, it's a count
10 of subscribers. The frame is the 57,600 subscribers reported
11 by MarkMonitor. Of those 57,600, 13,441 had tickets before the
12 claim period, so to the left of this time frame. That 13,441
13 represents 23.3 percent of the 57,600, and that's what's
14 depicted in the, in the pie chart there, the 23.3 percent.

15 BY MR. ZEBRAK:

16 Q. And whose records is this data based on?

17 A. It's based on the ticket data from Cox.

18 Q. Okay. And are you familiar with someone by the name of
19 Christian Tregillis?

20 A. Yes, I am.

21 MR. BUCHANAN: Objection, Your Honor. This is an
22 expert.

23 THE COURT: Well, I think we've got a preview of a
24 slide with his name on it, but I don't know what that --

25 MR. BUCHANAN: He hasn't testified yet, so -- I'm

1 anticipating it would be rebuttal. And so you're going to ask
2 him questions about his report when he hasn't testified yet.

3 THE COURT: Okay. Overruled. I think that's proper.
4 Mr. Tregillis will have an opportunity to address issues.
5 Well, let's see where you're going with this.

6 MR. ZEBRAK: Yeah, they had received the slides, and
7 I hadn't heard of an objection, but I'm happy to proceed.

8 BY MR. ZEBRAK:

9 Q. Are you familiar with who Christian Tregillis is?

10 A. Yes.

11 THE COURT: Is he going to critique his report at
12 this stage, or is this something else?

13 MR. ZEBRAK: No, Your Honor.

14 THE COURT: Okay. Go ahead.

15 MR. ZEBRAK: May we have a quick sidebar?

16 THE COURT: Yeah.

17 MR. ZEBRAK: Thank you.

18 NOTE: A sidebar discussion is had between the Court
19 and counsel out of the hearing of the jury as follows:

20 AT SIDEBAR

21 THE COURT: All right. So we don't rebut somebody's
22 testimony based on the report. We wait until they testify, and
23 then we report -- rebut their testimony if you feel it's
24 proper.

25 MR. ZEBRAK: Yes, sir.

1 THE COURT: So what have you got here?

2 MR. ZEBRAK: Well, we thought it would just be useful
3 for the jury to understand that Mr. Tregillis agrees that over
4 95 percent of the works in suit match to infringement notices.
5 It's really just showing -- you know, it's sort of
6 provisionally indicating that Mr. Tregillis agrees, but, quite
7 frankly, I mean, if Your Honor wants to do that, we can --

8 THE COURT: Yeah, let's move on beyond that. You can
9 cross-examine Mr. Tregillis on that.

10 MR. ZEBRAK: Yeah. We just thought it would be
11 useful for the jury, but we can move on.

12 THE COURT: Okay.

13 MR. ZEBRAK: Thank you.

14 THE COURT: All right. Thank you.

15 NOTE: The sidebar discussion is concluded;
16 whereupon, the case continues before the jury as follows:

17 BEFORE THE JURY

18 THE COURT: All right. Please go ahead.

19 MR. ZEBRAK: We pass the witness at this point, Your
20 Honor.

21 THE COURT: All right.

22 MR. ZEBRAK: Thank you.

23 THE COURT: Cross-examination, Mr. Buchanan?

24 MR. BUCHANAN: Yes, please, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. BUCHANAN:

2 Q. Good afternoon, Dr. McCabe. How are you?

3 A. Fine.

4 Q. I promise there will be no spreadsheets here for this
5 examination.

6 So you, as I understand it, have been associated with
7 Purdue University for 50 years; is that right?

8 A. That's correct.

9 Q. Okay. And from 2004 to 2018, you were a dean of a
10 department; is that right?

11 A. I was an associate dean for the College of Science.

12 Q. And you also taught courses at the same time?

13 A. I had a reduced teaching load.

14 Q. Okay. And you spent, I think, 75 percent of your time on
15 administrative work related to being a dean?

16 A. That's correct.

17 Q. And then other time you were teaching as well a course a
18 semester?

19 A. I was primarily doing research, but, yeah, I did --

20 Q. Okay. So is it fair to say that over the last ten years,
21 you've done very little expert testimonial work?

22 A. Over the last?

23 Q. Ten years.

24 A. In court or related matters, I'm not sure. I have --

25 Q. It would be a very small amount of work in the last

1 ten years that related to expert work, right?

2 A. Probably the same amount during my 50 years. I think it's
3 been a small amount throughout my career.

4 MR. BUCHANAN: Can we give him the binder?

5 BY MR. BUCHANAN:

6 Q. So I'd ask you to take a look at your deposition
7 testimony, page 81.

8 Can we pull that up, transcript 81, lines 3 through
9 8?

10 And maybe this would help you refresh your
11 recollection.

12 MR. ZEBRAK: Excuse me, Your Honor.

13 THE COURT: Yeah.

14 MR. ZEBRAK: This is --

15 THE COURT: Take the -- take it down. Ask him --
16 let's not put it up on the screen.

17 MR. BUCHANAN: Okay.

18 THE COURT: Just ask him whether that refreshes his
19 recollection.

20 MR. BUCHANAN: Okay.

21 THE COURT: Ask him to read the section that you want
22 him to read.

23 MR. BUCHANAN: Okay.

24 THE COURT: Everybody does refreshing recollection
25 and past recollection recorded a little differently, so this is

1 the way I would like to do it, Mr. Buchanan. So if you'd just
2 identify the segment where you're looking and see whether it
3 refreshes his recollection.

4 BY MR. BUCHANAN:

5 Q. Okay. So if you look at your deposition transcript, do
6 you see that lines 3 through 8 on page 81?

7 A. Page 81, lines 3 through 8?

8 Q. Right.

9 A. I'm not sure of the context of the question that I can get
10 from those -- I'm speaking --

11 Q. If you look at, start with line 21: Okay. How about over
12 the last ten years?

13 MR. ZEBRAK: Excuse me, Your Honor, Mr. Buchanan
14 understands the objection.

15 THE COURT: No, he's focusing on a, on a specific
16 sentence.

17 MR. BUCHANAN: That's -- I've given him the line.

18 THE COURT: Yeah, that's proper.

19 MR. ZEBRAK: Thank you, Your Honor.

20 THE WITNESS: I see. So if it's strictly speaking as
21 an expert witness, I have done very -- relatively little of
22 that, I'd say a dozen times or so over my career in court as an
23 expert witness. I don't know if you count depositions or --

24 BY MR. BUCHANAN:

25 Q. No, the, the question I had was in the last ten years, how

1 much -- isn't it true that you've done a very small amount of
2 work as an expert witness?

3 A. Yes. I have done a small amount of work.

4 Q. Okay. Thank you.

5 And I know you -- and on your direct, you mentioned
6 some of the work you had done as an expert witness, and I think
7 you mentioned some equal employment cases; isn't that right?

8 A. That's correct.

9 Q. Okay. Wasn't the last time you testified in court in
10 1996? It was a case down in South Carolina? You testified for
11 the Medical College of Charleston in a discrimination case?

12 A. I recall that case. I believe I testified in Kansas on a
13 food -- a pet food recall case. I'm not sure that the issue
14 there was whether or not -- I can't remember the details, but I
15 did testify before a judge, not before a jury, and it was a
16 matter of whether there should be a separate trial in Kansas
17 versus the Kansas issues combined with a larger group of
18 plaintiffs.

19 So I don't know if that's called expert witness
20 testimony or not, but that was the last time I spoke in a court
21 with a judge.

22 Q. Okay. And you testified, I think, in some other
23 discrimination cases in the '70s and '80s?

24 A. Yes.

25 Q. Okay. Isn't that sort of the last time you actually

1 testified in court, in those cases for General Motors and
2 Michigan State University in class action discrimination cases?

3 A. That would have been most of my in-court testimony, yes.

4 Q. And you were representing Michigan State, General Motors,
5 the State of South Carolina against the plaintiffs, right?

6 A. I'm not sure about the word "represented," but I was
7 employed by them.

8 Q. Okay. And I think you admitted or testified on direct
9 that you have never testified prior to this case in a case
10 involving copyright infringement or peer-to-peer networks;
11 isn't that right?

12 A. That's correct.

13 Q. Okay. You're not an expert in any of those areas; is that
14 right?

15 A. I'm not an expert in those areas.

16 Q. Other than this case, you've never been retained by a
17 music company to testify; is that correct?

18 A. By a music company?

19 Q. Like one of the plaintiffs in this case, a recording
20 company, recording label?

21 A. To testify in court, no.

22 Q. Okay. So you have been retained before by the plaintiffs'
23 counsel, have you not?

24 A. That's correct.

25 Q. And that was a case involving analyzing inventory of a dog

1 books dog store and tracking the inventory and books going in
2 and out, right?

3 A. That's correct.

4 Q. Okay. And how much did you get paid in that case; do you
5 recall?

6 A. I don't recall. It was a while ago. It was relatively a
7 short, very specific task that I was asked to do there.

8 Q. And how much have you been paid in this case? I know
9 you -- you gave your hourly rate, and you said the hours.
10 What's the total, about 100,000?

11 A. That would be correct in round numbers.

12 Q. And you've been sitting in the courtroom for the last two
13 or three days, is that right, watching this?

14 A. That's correct.

15 Q. Okay. Have you been paid for that?

16 A. Yes.

17 Q. Okay.

18 A. I haven't been paid yet for that. I assume I will be.

19 Q. I hope you bill. Okay.

20 So you're not an expert on, like, businesses and how
21 they operate and procedures of businesses, are you?

22 A. I am not.

23 Q. And I think you've actually acknowledged to me in your
24 deposition that you've never taken a business course; is that
25 correct?

1 A. That's correct.

2 Q. Okay. And your report, I think there were four reports,
3 were there not, that you wrote?

4 A. I would have to verify that. That sounds reasonable.

5 Q. Did you write all those reports, or did you just outline
6 them?

7 A. I wrote the reports. They're my work.

8 Q. Okay. Could you take a look at your transcript, at
9 page 78, lines 5 through 15?

10 A. Page 78, line 5?

11 Q. Line 5 through 15.

12 A. It says: I outlined the report.

13 Q. Okay. And could you look at your same transcript, at 261,
14 line 21?

15 A. Page 261?

16 Q. Yeah.

17 THE COURT: Do you have an objection?

18 MR. ZEBRAK: Your Honor, I don't understand this
19 would be an impeachment issue. He's just asking him --

20 THE COURT: Well, let's just see where it goes.

21 MR. BUCHANAN: Your Honor, if I might?

22 THE COURT: Proceed.

23 MR. BUCHANAN: All right, thank you.

24 BY MR. BUCHANAN:

25 Q. So you have --

1 A. I'm sorry. I'm not there yet.

2 Okay. 261?

3 Q. Yes.

4 THE COURT: What line?

5 BY MR. BUCHANAN:

6 Q. 21.

7 A. I say: In my view, I am the author. I started with the
8 outline.

9 Q. Okay. So you said you wrote the reports, and I asked you
10 if you just outlined them. So did you outline them or did you
11 write them?

12 A. I wrote them. I outlined them and I wrote them. I always
13 start with an outline.

14 Q. And if you look at your testimony there, doesn't it
15 describe that you had other people fill in the pieces and add
16 footnotes and add other text? All that happened?

17 A. Yes.

18 Q. And did lawyers helped write it?

19 A. Excuse me?

20 Q. Did lawyers contribute to the reports?

21 A. Well, there -- yeah, there are types of footnotes that I
22 don't know how to do properly, so in terms of you can see
23 there's technical legal things included in the report.

24 Q. So --

25 A. I --

1 Q. You testified that you were assigned a specific task here
2 and that at least the fundamental part of that task was to look
3 at all the ticket data that was given to you for the claim
4 period and determine how many notices were provided to Cox
5 subscribers by the plaintiffs for their works in suit after
6 they had received two; is that correct?

7 MR. ZEBRAK: Objection, Your Honor. That
8 mischaracterizes his prior testimony.

9 THE COURT: Okay. Why don't you ask him what his
10 understanding of what his assignment was.

11 MR. BUCHANAN: Could we pull up their, their
12 demonstratives? Yeah. If you could go to the next?

13 BY MR. BUCHANAN:

14 Q. So, so why don't you repeat again what your task was.

15 A. My first task was to do a works in suit analysis.

16 Q. So did you have a certain number of notices that you
17 looked at to try to determine whether someone was a so-called
18 repeat infringer? I think you used that term. That was three
19 or later, right?

20 MR. ZEBRAK: Objection. Mischaracterizes --

21 THE WITNESS: I'm not sure if you're talking about
22 the works in suit analysis or the repeat infringer analysis.

23 BY MR. BUCHANAN:

24 Q. Okay. So you looked at -- what is the claims period in
25 this case?

1 A. It's on the slide --

2 Q. No, I'm just asking you, do you know what it is?

3 A. February 1, 2013, until November 26, 2014. I'd have to
4 double-check that. I'm sorry.

5 Q. Okay. So as I understand it, when you -- you were asked
6 to look at that time period and determine and to locate those
7 Cox subscribers that received a notice from the plaintiffs
8 after they had received two prior notices; is that right?

9 A. That's right. The third or more, and that's depicted as
10 the second bullet on this page.

11 Q. So --

12 A. I'm sorry, three or more. Is that what I said?

13 Q. Pardon me?

14 A. I'm not sure if I said two or more or three or more. I
15 meant three or more.

16 Q. Were you able to determine -- when you did that, were you
17 able to determine how many of the three were from a third-party
18 content owner as opposed to one of the plaintiffs?

19 A. I did not do that analysis.

20 Q. Okay. Did you do the analysis to determine how many
21 received just one notice during the claim period?

22 A. I did calculate the number that received one, two, three,
23 four, every possible number. I, I computed the actual number
24 and the --

25 Q. Okay.

1 A. Yes. So --

2 Q. How many Cox subscribers received just one notice during
3 the claim period?

4 A. I don't have that number stored in my memory.

5 Q. Okay.

6 A. I computed it.

7 Q. How about two? Do you know how many received just two
8 during the claim period?

9 A. No, I don't --

10 Q. But you did --

11 A. -- recall.

12 Q. -- compute it?

13 A. I computed it for every number, one, two, three, four, up
14 to however many there were.

15 Q. But -- so you didn't include it in your report or your
16 testimony because you were told not to; isn't that true?

17 A. No.

18 MR. ZEBRAK: Objection, Your Honor. Compound.

19 THE COURT: He answered the question no.

20 BY MR. BUCHANAN:

21 Q. Okay. Could you take a look at your deposition transcript
22 at page 91, please? Line 14.

23 A. I'm sorry, I'm not there yet.

24 Q. Okay.

25 A. Okay. I'm on page 91.

1 Q. Okay. Line 14 through 17, could you read that, please?

2 A. And why did you not include the first and second notice?

3 MR. ZEBRAK: Your Honor, may we have a sidebar?

4 THE COURT: Well, no.

5 Does that refresh your recollection as to why you did
6 not include one and two?

7 THE WITNESS: Line 14 just has a question why.

8 THE COURT: All right, let's come to the sidebar.

9 NOTE: A sidebar discussion is had between the Court
10 and counsel out of the hearing of the jury as follows:

11 AT SIDEBAR

12 THE COURT: Okay. What's the objection?

13 MR. ZEBRAK: Well, on two fronts. First of all,
14 Mr. Buchanan is a well-experienced attorney. He knows how to
15 do impeachment. And what he's doing is he purports to be
16 refreshing recollection, yet he's just asking him to read his
17 transcript into the record.

18 Number one, I believe that to be improper. Number
19 two, he's conflating the repeat infringer analysis with the
20 works in suit analysis, and specifically he's already testified
21 that plaintiffs set the criteria for the works in suit
22 analysis, and now he's saying, in the works in suit analysis,
23 why didn't you look presumably for those works infringed in a
24 person's first or second notice, whereas plaintiffs, you
25 know --

1 THE COURT: He's framing what he was asked to do in
2 his report, and if that came from instructions from plaintiff,
3 that came from instructions from plaintiff. If it didn't and
4 he made that decision independently, he can testify about that.
5 What's wrong with that? I don't understand this.

6 MR. ZEBRAK: Sir, there's nothing wrong with that,
7 and I don't object on that basis. What I was saying is that he
8 already testified that plaintiffs' counsel gave him the four
9 criteria, and I just think that -- I have an issue with having
10 him just read his transcript into the record, and I think the
11 whole line of questioning is confusing because it's imprecise
12 between the two analyses.

13 THE COURT: Okay. So I've already asked that you --
14 if you're going to refresh his recollection, just point to the
15 page and line and let him read it and say, does that refresh
16 your recollection? If it doesn't, then you can go to past
17 recollection recorded, and didn't you say previously, and then
18 he's allowed to read it into the record.

19 Is that -- am I missing something here?

20 MR. OPPENHEIM: May I ask a -- offer an idea here?
21 Dr. McCabe is not an experienced witness, unlike a lot of the
22 experts here, and that's fine.

23 THE COURT: Yeah.

24 MR. OPPENHEIM: He doesn't understand that he's not
25 supposed to read it into the record when he's asked to refresh

1 his recollection. Maybe we could just instruct him that, have
2 him read it to himself --

3 THE COURT: Okay.

4 MR. OPPENHEIM: -- so we do this properly.

5 He can either impeach him or he can refresh his
6 recollection, but, you know, there's a way to do this, and
7 Mr. Buchanan knows how to do it.

8 THE COURT: Okay. Understood. I'll so educate him.
9 All right?

10 MR. OPPENHEIM: Thank you, Your Honor.

11 NOTE: The sidebar discussion is concluded;
12 whereupon, the case continues before the jury as follows:

13 BEFORE THE JURY

14 THE COURT: All right. So, Dr. McCabe, when counsel
15 asks you to -- when counsel asks you to look at a certain page
16 or paragraph to see whether that refreshes your recollection,
17 you don't need to read that into the record. You just need to
18 read it to yourself and say yes or no, and then we'll follow up
19 from there. Okay?

20 THE WITNESS: Thank you.

21 THE COURT: Does that work?

22 THE WITNESS: Yes.

23 THE COURT: All right. Thank you.

24 Please proceed, Mr. Buchanan.

25 BY MR. BUCHANAN:

1 Q. So I'll ask the question again: Why didn't you include
2 those subscribers who received one or two notices in terms of
3 linking them to the works owned by the plaintiffs?

4 A. Are we talking about the repeat infringer analysis or the
5 works in suit analysis?

6 Q. We'll start with the works in suit.

7 A. Okay. So the works in suit analysis, yes, this talks
8 about linking notices with works in suit, and there I was told
9 that, and that was on the slide, that I should look at third or
10 later infringement.

11 Q. Okay.

12 A. So I counted the first infringement and second
13 infringement, but in works in suit, I looked at only those
14 infringements corresponding to a third or later infringements,
15 and, yes, I was told that was part of my assignment, if you
16 will, or the framework of what I was asked to do.

17 Q. So you were told in that particular situation not to
18 include the one and two?

19 A. I included them in that I counted them, and that's how I
20 determined which one was the third. So, yes, they were
21 included in the analysis. I need to know that there is a one
22 and a two to define what No. 3 is, etc.

23 Q. But you didn't include it in your report, correct?

24 A. It's not in a report of the works in suit.

25 Q. So could we go to your expert report, your first one?

1 It's tab 2, and look at paragraph 16a.

2 Do you have that?

3 A. I do.

4 Q. Okay. So that section says Cox's copyright abuse ticket
5 records indicate that it received at least 315,054 notices
6 between January 1, 2012, and December 1, 2014. Of those,
7 42,000 were sent regarding --

8 THE COURT: Slow down a little bit so we make sure we
9 get this on the record, please.

10 MR. BUCHANAN: Okay.

11 BY MR. BUCHANAN:

12 Q. Of those, 42,236 were sent regarding a subscriber for whom
13 Cox had previously received at least one other notice.

14 Do you see that?

15 A. I do.

16 Q. So if you subtract 42,236 from 315,054, you get about
17 272,000 notices, right?

18 A. I'll assume that your arithmetic is correct.

19 Q. But those that -- that can't be right, could it, because
20 we have 57,000 subscribers, so you couldn't have 272,000
21 notices that went to 57,000 subscribers and just got one
22 notice. That math is not right, is it?

23 A. I'm not following your math or your argument.

24 Q. Okay. You say there that there were 315,000 notices,
25 right?

1 THE COURT: Notices or tickets?

2 MR. BUCHANAN: Notices.

3 THE COURT: Okay.

4 BY MR. BUCHANAN:

5 Q. Do you see that? And you have --

6 A. Yes.

7 Q. -- 42,000 notices were sent to a subscriber for whom Cox
8 had previously received at least one other notice.

9 A. At least one other --

10 Q. Okay.

11 A. -- notice.

12 Q. So that means the difference went to the other
13 subscribers, right, the ones that just got one, those that
14 didn't get more than one, right?

15 A. At least one other means two or more.

16 Q. Okay. So 42,000 of the 315,000 notices were sent to
17 someone that had at least two. So that means the difference is
18 270,000, and that went to those that had one, right?

19 A. We're talking about notices, not subscribers, right?

20 Q. It said -- you wrote it. It says notices.

21 A. Notices.

22 Q. Okay. So you can't --

23 A. But your arithmetic was doing subscribers, right?

24 Q. I'm just -- I'm doing your math. 315,000 notices,
25 42,000 notices went to subscribers who had two or more. That

1 means the difference went to the others, which would be those
2 with one. And you can't send 270,000 notices to 57,000 people
3 and have one for one, can you?

4 A. This isn't counting people. The other displays were
5 counting subscribers. This is notices.

6 Q. Well --

7 A. And the arithmetic doesn't match because it's --

8 Q. But you wrote this. I'm just asking you --

9 A. Yeah, I'm not disputing what I wrote. I don't understand
10 why it's inconsistent with something else I wrote concerning
11 subscribers.

12 Q. Well, I don't know what else -- you say you're referring
13 to some other thing you wrote. I'm just looking at this, the
14 summary of your opinions, the very first one in this report
15 that you spent, looked at all that data and analyzed it, and
16 the very first one doesn't seem to me to make any sense.

17 A. So it says -- so I -- I don't understand what doesn't make
18 sense. You took the 315,000 and subtracted 40,000, and what
19 doesn't make sense about that subtraction?

20 Q. Because that means 42,000 of the 315,000 notices went to
21 people that had two or more, which means the difference,
22 270,000, went to those that had one, but if you have 57,000
23 subscribers and there's 270,000 notices, that is not one for
24 one.

25 All right. Why don't we go to another calculation.

1 MR. OPPENHEIM: There's no answer.

2 THE COURT: Yeah, let him answer. Do you want to
3 explain that?

4 THE WITNESS: No, I'm still a little confused about
5 what, what you're --

6 THE COURT: Okay. All right. Please proceed,
7 Mr. Buchanan.

8 BY MR. BUCHANAN:

9 Q. Okay. Could you turn to paragraph 50 of your report?

10 So here's one of your findings --

11 A. I'm sorry, I'm not there yet.

12 Q. Okay. It's page 10.

13 A. Got it.

14 Q. Paragraph 50, you talk about some action content data, and
15 what I'm focusing on, you have hard limits for complaints with
16 24 percent, and you cite appendix 6. Do you see that?

17 A. I do.

18 Q. Okay. Let's look at appendix 6. Hard limit for
19 complaints is about 47,000, right?

20 A. I'm sorry, where -- you're at appendix 6?

21 Q. This is your appendix, right? You created this?

22 A. We're on appendix 6?

23 Q. Yeah. You created this document, right?

24 A. Yes.

25 Q. Okay. Hard limits for complaints, do you see that,

1 47,000?

2 A. 46,997, yes.

3 Q. Okay. Can we use 47,000?

4 A. Yes.

5 Q. Okay. So you're saying the hard limit for complaints
6 was -- this 47,000 was 27 percent of 315,000 unique tickets,
7 right?

8 Go back to paragraph 50 on page 10. Do you see the
9 24 percent?

10 A. Yes.

11 Q. And it's actually 14 percent if you divide 315,000 into
12 47,000, is it not?

13 A. I'm not following what you're saying, but I think you're
14 addressing the missing values. Is that --

15 Q. Do you see paragraph 10? It says hard limits for
16 complaints was 24 percent of 315,000.

17 Correct?

18 A. Hard limits for complaints was 24 percent. Yes.

19 Q. But 47,000 --

20 THE COURT: Hold on. Let him look at it.

21 MR. BUCHANAN: Okay.

22 THE WITNESS: I see it says 24 percent there, yes.

23 BY MR. BUCHANAN:

24 Q. Okay. So that's 24 percent of 315,000, right?

25 A. Where are you getting the 315 from?

1 Q. 48, paragraph 48.

2 A. Oh, I'm sorry, where on paragraph 48?

3 Q. So we were at paragraph 50. Now we're trying to get the
4 calculations that you did, you know, using the applied
5 statistics.

6 A. Okay. So in paragraph 48, where --

7 Q. It says --

8 A. You're taking the number 315,054 --

9 Q. Right.

10 A. -- unique tickets.

11 Q. So if you divide 315,000 into 47,000, it's not 24 percent,
12 is it?

13 A. I don't think that's the arithmetic that we're -- I don't
14 think we're on the same page there. Because you're talking
15 about the number of unique tickets? So a particular ticket
16 could have more than one action content form entries, I
17 believe. So I don't think the -- you can, you can do that.
18 I'm not sure.

19 Q. So where did you -- what is the 47,000 hard limits, what
20 is that 24 percent of?

21 A. Of the --

22 Q. Okay. Take --

23 A. It would be of the appendix 6 --

24 THE COURT: Hold on, let him finish. Go ahead.
25 Finish, Doctor.

1 THE WITNESS: If you look at appendix 6, and this is
2 a standard thing in the output, the last line there says:
3 Frequency missing, 369,284.

4 So that's the number of entries in the Cox ticket
5 data that had nothing in the field action content form. Action
6 content form could have any of these things listed in
7 appendix 6, or it could have nothing.

8 So the percent was computed -- which one were we
9 talking about? The --

10 THE COURT: 24 percent.

11 THE WITNESS: The 24 percent for hard limit for
12 complaints, and that's given in this output. So it's
13 23.4 percent. That's of the non-missing entries for the field
14 action content form, 24 percent or 23.4 percent of those had
15 the words "hard limit for complaints" entered into that field.

16 BY MR. BUCHANAN:

17 Q. So --

18 A. So that's what's computed here.

19 Q. So, I'm sorry, you divided what number into the 47,000?

20 A. The -- I didn't divide. This is what the software
21 produces, standard output for this kind of data. You look at
22 the entries that are not missing, and you divide out by the
23 total number of those.

24 So if you take the column Frequency in appendix 6 and
25 add up all of those, that's the denominator that's used as the

1 basis for the, for the 24 percent. That number is not given on
2 the output. What is given is just the -- at the bottom with an
3 asterisk the number of missing or it calls it null, null values
4 for action content form.

5 Q. So you're saying that if you divide 370,000 into 46,000,
6 it comes to 24 percent?

7 A. Could you say that again?

8 Q. We can move on.

9 Why don't I direct your attention to your transcript,
10 page 194. See if that refreshes your recollection that we
11 discussed that in your deposition.

12 A. 194?

13 Q. Yes, line 7, 7 through 11.

14 A. I'm sorry, I'm not there yet.

15 Q. Okay.

16 A. Page 194, line 7.

17 Q. So read, read the question and answer there, and tell me
18 if that doesn't refresh your recollection as to how we did the
19 calculation during your deposition, when you were -- you were
20 also under oath there as well.

21 A. I recall the conversation that we had, and my
22 understanding is that it's exactly the same as the conversation
23 that we just had.

24 Q. Okay.

25 A. I explained to you what the software does, that that's a

1 standard output for a categorical variable. When you compute
2 percents, you divide by the number of non-missing values.
3 There would be an option to divide by some other number if you
4 would like to divide by some other number, but that's not what
5 the, the default or standard calculation is.

6 Q. So if I may just read the Q&A of this, that's --

7 THE COURT: Is it inconsistent with what he just
8 talked about?

9 MR. BUCHANAN: It is inconsistent.

10 THE COURT: Go ahead.

11 BY MR. BUCHANAN:

12 Q. Okay. So what I asked you -- by the way, there's two
13 lawyers that are objecting, you know.

14 THE COURT: I haven't heard any objection.

15 MR. BUCHANAN: All right.

16 THE COURT: And let's be calm and quiet here unless
17 you have a formal objection. Then stand up and say, "Object,"
18 okay?

19 MR. OPPENHEIM: Yes, sir.

20 THE COURT: Okay.

21 BY MR. BUCHANAN:

22 Q. So there you say -- I asked you: Okay. So a hard limit
23 for complaints of 46,997 is not 24 percent of 315,000, is it?

24 That's correct.

25 So -- it's 14 -- it's about --

1 It's necessary to read it very carefully. So 16a
2 says -- and then you talk about the copyright, and then --

3 MR. ZEBRAK: Objection, Your Honor. He's not reading
4 it.

5 THE COURT: Overruled.

6 BY MR. BUCHANAN:

7 Q. So, so you read that? I ask you: So a hard limit for
8 complaints of 46,997 is 24 percent of 315,000?

9 And you said: That's correct?

10 A. I'm sorry, what line are you on? I'm having trouble
11 following you.

12 Q. Line 7.

13 A. Line 7, okay. This says 24 percent is not something, and
14 that's just arithmetic you're saying, right?

15 Q. Right. That's how we started out as doing that
16 calculation, and here you agreed that the arithmetic worked,
17 and you didn't dispute the numbers in the calculation, did you?

18 A. If you take 46,000 and divide by 350,000, you don't get 24
19 percent. I agree. I think that's what I was -- it's hard to
20 take this out of context, so yeah. But that --

21 Q. Could, could you take a look at your report, paragraph 49
22 and 50? We were just there.

23 And you have a lot of data here, part of your
24 findings, 49 and 50, we went over one part of it, but isn't it
25 true when you put that information in there, that you didn't

1 understand what it was?

2 A. No.

3 Q. Okay. Could you look at paragraph -- page 189 of your
4 deposition? So --

5 A. I'm not there yet.

6 Q. Okay.

7 A. Okay.

8 Q. All right. So if you look at page 189 of your deposition,
9 line 3, can you just read down and over to the next page, down
10 to 14?

11 A. Wait. So read page 189, starting on line 3?

12 Q. At line 1 -- or line 3, yes. And then if you go over
13 to --

14 A. I don't understand what it's referring to, starting on
15 line 1 or line 3, because it says: You're not suggesting that
16 means --

17 Q. Okay.

18 A. I don't know what that refers to.

19 Q. Okay. Go back -- just a little higher and start with
20 line 16 on 188, where it says: Then if you look at sent
21 warning, changed status to closed.

22 All right?

23 A. Okay. I need to do this a little bit slowly because I
24 haven't looked at this in a while.

25 Q. Okay. That's fine. And then if you need to, you can go

1 back to paragraphs 49 and 50 of your report and see if that's
2 not what we're discussing there.

3 A. So I -- you asked me a question: Do you have any idea why
4 they're using that terminology?

5 And I said: No, I don't know why Cox is using that
6 terminology in their data file. All I know is that the
7 relative frequency of the different terms that they used -- and
8 that's what I reported in that appendix, or No. 6. I don't
9 know if --

10 Q. So --

11 A. But I don't know anything more than what those words said,
12 and I, you know, had the computer read those words and put them
13 in, in the summary.

14 Q. So my question was those are more findings that you made
15 using the applied statistics, and what I was asking you is even
16 though you put those findings in there, you didn't really know
17 what they meant. And are you agreeing with that?

18 THE COURT: What they meant to Cox?

19 MR. BUCHANAN: What they meant to him in reading
20 them.

21 THE WITNESS: What they meant to me was that they
22 were different entries in the computer file.

23 BY MR. BUCHANAN:

24 Q. But you didn't --

25 A. As I said, I took the data at face value. This is Cox's

1 data, and I made a table of the different possible entries that
2 could be in that column and counted them.

3 Q. Okay. These are findings, and isn't it true that you put
4 these findings in there even though you didn't know what the
5 data meant? Isn't that what that passage is I just showed you?
6 Doesn't it say --

7 A. I did not have any definition of those terms; that's
8 correct.

9 Q. Okay. So if you don't have a definition, that means you
10 don't know what they mean.

11 A. Not necessarily, but I would -- as I said, I don't, I
12 don't know why they're using that terminology.

13 Q. Okay.

14 A. I don't know the meaning of those things. I was just
15 trying to describe the data that was given to me by Cox.

16 Q. And didn't you actually ask people -- in fact, you asked a
17 lot of people what that meant, but you couldn't get any
18 answers; isn't that right?

19 A. No.

20 Q. Isn't that what -- go read the passage again. See if it
21 doesn't say that.

22 A. That it says I asked a lot of people? I didn't see that.

23 MR. BUCHANAN: Can I read or no?

24 THE WITNESS: Where are you?

25 THE COURT: Direct him to a line and --

1 BY MR. BUCHANAN:

2 Q. Okay. Line 1, page 190: -- tell me what they mean, give
3 me definitions. Give me -- we even have words for that. In
4 some computer statistical packages --

5 And you say you called it a code book?

6 MR. ZEBRAK: Your Honor?

7 THE COURT: Yes, sir.

8 MR. ZEBRAK: I'm not sure what's happening now.

9 THE COURT: All right.

10 MR. ZEBRAK: This is --

11 THE COURT: Well, let's go back, the question was --
12 did you ask -- he asked you whether you had asked lots of
13 people. He directed you to this specific reference in the page
14 and line, and does that refresh your recollection?

15 THE WITNESS: No, not, not what I read on page 190.

16 THE COURT: Okay. All right. Next question.

17 MR. BUCHANAN: I'm sorry, I didn't hear that.

18 THE COURT: He said no, it doesn't refresh his
19 recollection. I don't know what's on the page. Do you want
20 to -- do you want to --

21 MR. BUCHANAN: Am I allowed to --

22 THE COURT: Yeah, you can now use the statement and
23 ask him did he not -- did I not ask you this question and did
24 you not say the following?

25 MR. BUCHANAN: All right.

1 THE COURT: Please go ahead.

2 BY MR. BUCHANAN:

3 Q. So, so we'll start there, and at the top, it says -- you
4 actually answered my question about did you try to find --

5 THE COURT: Let's ask questions and see if he
6 answered it inconsistently with what he's saying today.

7 BY MR. BUCHANAN:

8 Q. Okay. The question I asked you earlier was, you already
9 said you didn't know the definitions of the words and you just
10 put them in there as your findings, and I asked you didn't you
11 actually go try to find out the answers to that?

12 And you made a reference to, like, the code book in
13 applied statistics, that that's what you're looking for.

14 THE COURT: None of that's in the record. It's all
15 stricken.

16 MR. BUCHANAN: All right.

17 THE COURT: And I know you're trying to explain the
18 setting here, but that is not the way this works, because now
19 you're testifying again, and we went through that.

20 MR. BUCHANAN: All right.

21 THE COURT: It assumes facts not in evidence. But if
22 you have a question and an answer which is inconsistent with
23 what he's said today, you certainly may impeach him with that,
24 but not the following paragraphs and see if you don't get a
25 sense of this or that.

1 THE WITNESS: If I could clarify my answer, I
2 think --

3 THE COURT: No, let's wait for --

4 MR. BUCHANAN: I can, I can read what he testified to
5 now, right?

6 THE COURT: If there's a question that you asked him
7 and he answered inconsistently, you certainly can read that and
8 say, didn't you say that previously?

9 MR. BUCHANAN: All right.

10 THE COURT: Sure.

11 MR. BUCHANAN: He says he doesn't remember, but the
12 passage says what he says.

13 THE COURT: Didn't you say in your deposition when
14 you were asked the following question and the following answer?

15 BY MR. BUCHANAN:

16 Q. Now, I'll ask it again, and this is how we started, and I
17 asked you -- you gave me one answer, that -- about you didn't
18 have the definition. I asked you: Did you ask people that you
19 were working with, including, you know, all the people you're
20 working with, whether, in fact, you sought from them what those
21 words meant that went into those two findings?

22 And are you saying that you didn't ask anyone?

23 A. I can explain. I apologize that I answered too quickly.
24 I did not read all of page 190. I felt a little bit rushed. I
25 read the top part; I didn't read the bottom part.

1 So there is a question that was asked to me, and I
2 answered: I always asked everybody give me what I would call
3 the code book.

4 That answer refers to my general behavior or
5 procedures when I get data, and that is, can you give me the
6 code book? That code book is particular jargon for a
7 statistical package called SPSS, and it does exactly what --
8 the kind of things we were talking about. It would give me the
9 list of possible values for those fields that are given in
10 that, that appendix, and what each of them means.

11 I said: Do you have that? I asked plaintiffs'
12 counsel: Do you have a code book that explains all these
13 variables?

14 The answer was no.

15 So -- but the context of did I ask everybody, I
16 always ask everybody: Can you give me some data, tell me what
17 I need to know about each of the fields and the meaning of
18 those, those entries.

19 THE COURT: All right. Thank you, sir.

20 All right. Next question.

21 BY MR. BUCHANAN:

22 Q. Okay. And I think you -- okay. So you said that you
23 asked for it, and you didn't receive it, and I think -- do you
24 recall that you don't know why you never received it?

25 A. I don't think it exists.

1 Q. Why don't you take a look at your testimony there and tell
2 me if, in fact, you say that, that it doesn't exist. Why don't
3 you read where it starts, line 11: So I never received that,
4 and I don't know why.

5 And then read the rest after that.

6 A. I had a lot of other things to do, and I never pursued
7 this any further than to summarize in the summary that I gave
8 in this report.

9 Q. So you had a lot of -- those are findings in your report,
10 and you had -- you're saying you had a lot of other things to
11 do, and so you just moved on.

12 A. That's a fair summary of what I said, I believe.

13 Q. Okay. All right, can we pull up their slides?

14 Okay. Let's go to slide 7. Now, the claims period,
15 I think you correctly testified, is in February 2013 to
16 November 2014. Do you remember that?

17 A. I do.

18 Q. Okay. This goes beyond that, a year earlier and a month
19 later, right?

20 A. That's correct.

21 Q. Okay. So did you actually analyze this same data for the
22 claims period which is at issue in this case?

23 A. No.

24 Q. Okay. And is that because you were told not to do it?

25 A. No.

1 Q. You just decided not to do it?

2 A. I didn't decide not to do things. I decided to do things.

3 Q. Okay. In fact, you did run the numbers.

4 THE COURT: Let him finish answering.

5 MR. BUCHANAN: Okay.

6 THE COURT: Were you finished, sir?

7 THE WITNESS: I think so.

8 BY MR. BUCHANAN:

9 Q. You did run those numbers, though, right?

10 A. No.

11 Q. You never did.

12 So let's start with January 1, 2012. You have 31,000
13 that had three or more, right?

14 A. That's what the display says, yes.

15 Q. How many had three?

16 A. It's not given on this chart.

17 Q. Well, I see that. I'm sorry. But did you calculate that?

18 A. Yes.

19 Q. Okay. What is it?

20 A. I don't recall.

21 Q. Okay. So this -- if you have 57,000 subscribers and
22 31,000 had three or more, how many had one or two?

23 A. The number is not on the chart. I computed it, and I
24 don't have it in my memory.

25 Q. Okay. Well, I'm just -- I was asking you to do the math

1 for me. 57,000 minus 31,000 is about 26,000.

2 A. The difference would be the number who had two or one.

3 Q. Okay. That's statistics, right? That's sort of --

4 A. It's arithmetic.

5 Q. Okay. So that means of all these subscribers, or all
6 tickets, which means we're talking about a three-year period, a
7 year beyond the claims period, right, and 26,000 had one or
8 two; is that right?

9 A. Approximately, yes.

10 Q. And do you know how many of those 26,000 had one?

11 A. As I said, I don't.

12 Q. Okay. And so then you go to six-plus, so again we're
13 talking about three years, and all ticket data means notices
14 from everyone that came into the tickets for that three-year
15 period, right, from the plaintiffs and from other content
16 holders that sent notices, right?

17 A. Correct.

18 Q. Okay. So if we go to six-plus, if you take -- subtract
19 31,000 from 16,000, we get 15,000 that had five or less,
20 correct?

21 A. You're doing 57 minus --

22 Q. 31,000 minus --

23 A. -- 16?

24 Q. -- 16,000, trying to get to those who had five or less.

25 Maybe you could do it for me.

1 A. To get five or less? I don't think you can recover that
2 from here.

3 Q. Well, if you have six-plus had 16 and you have 31,000 that
4 had three-plus, isn't the difference those that are in between?

5 A. Four or five.

6 Q. Yes.

7 A. But you said five, I thought.

8 Q. Oh, I said five or less.

9 A. Five or less. Yes, you could do that subtraction.

10 Q. Okay. So that would be 41,000 that had five, four, three,
11 two, or one, right?

12 A. You're saying 57,000 minus 16,000, okay. Is that what
13 you're saying?

14 Q. No. So what I'm getting at, if we get 31,000, 57,000,
15 that gave us 26,000 that had one or two?

16 A. You know, you're reading, it, and I can't process it that
17 fast; I'm sorry. I could write it down if you want or if you
18 want to write it down, but I -- you're just throwing numbers at
19 me. I can't do that.

20 Q. Okay. Just -- okay. Tell me how many had five or less
21 based on your chart. Can you calculate that?

22 A. That would be the difference between the total and the
23 number who have six or more, yes.

24 Q. And so how many would that be?

25 THE COURT: He just said he can -- if you want him to

1 write it down and subtract it, he'll do it. Otherwise, he's
2 given you his answer.

3 MR. BUCHANAN: Okay.

4 THE COURT: He's answered your question. Move on to
5 the next question.

6 MR. BUCHANAN: Okay.

7 THE COURT: Unless you want to give him a number and
8 ask him whether that sounds reasonable. I assume you have done
9 the math, and he's not here to do math, okay? I mean, he's not
10 here to do this function of the math. So if you have the
11 number --

12 MR. BUCHANAN: All right. Okay, Your Honor. I did,
13 I thought I tried to calculate.

14 BY MR. BUCHANAN:

15 Q. It's 41,000 that had five or less, right?

16 A. Yes, that looks right.

17 Q. Okay. And then isn't it nine or less, isn't it almost
18 50,000?

19 A. You do the complement of those numbers; that's correct.
20 Whatever that number, that arithmetic gives you, yes.

21 Q. So if you had nine or less, that could be three a year,
22 three in 2012 through three in 2013, three in 2014, right?

23 A. I wouldn't draw that conclusion. You say an average of
24 three or --

25 Q. Do you know when these notices came in?

1 A. No.

2 Q. Do you know whether they relate to a business subscriber
3 or a home?

4 A. No.

5 Q. So you don't know if they're, like, a hotel or -- a hotel
6 or a hospital versus a residence?

7 A. I was not given that information.

8 Q. Okay. But you, you do know how many business subscribers
9 there were, correct?

10 A. Yes.

11 Q. Okay. And you originally calculated that like 1800, and
12 then you increased it in your supplement report to 2800, right?

13 A. I don't recall all those numbers, I'm sorry.

14 Q. So do you recall the average amount of notices that a
15 business subscriber received during this time period?

16 A. I don't believe I calculated that kind of summary, but I
17 could have.

18 Q. All right. So, so could you go to your reply report? I
19 think it's tab, tab 4, paragraph 23. If you read that
20 paragraph of your report -- you wrote this, right?

21 A. Yes.

22 Q. Okay. So you say there's 2,868 business subscribers, and
23 what's the mean or the average?

24 A. I said I replicated Dr. Weber's calculation finding -- and
25 the median is given as 4 and the mean is given as 15.9. This

1 is a classic example why the mean is not a good descriptor of
2 the center of a distribution. It's highly skewed.

3 Q. I asked you if you calculated the mean. That's all.

4 A. That's what it says.

5 Q. That's what it says. You did that, right?

6 A. Yes.

7 Q. Okay. So when we go over here, if you apply the business
8 subscribers to the 13-plus and the 14-plus, they average 16?

9 A. I didn't -- I said I replicated Dr. Weber's calculation.

10 Q. And who is Dr. Weber?

11 A. One of your experts, I believe.

12 Q. She calculated numbers like you did in terms of --

13 A. I calculated what she reported and verified the accuracy
14 of her arithmetic.

15 Q. So you just -- is there a footnote to her report here?

16 All right. So you just took her number and put it in
17 your report, but you agree with it, right?

18 A. I verified the arithmetic that she performed.

19 Q. And then you used it in your report, so it must have had
20 some significance, right?

21 MR. OPPENHEIM: Your Honor, Dr. Weber has not
22 testified.

23 THE COURT: Stop. You're testifying, and he has a
24 right to ask why he put it in the report.

25 Ask him, do you recall -- you may testify as to why

1 that is put in your report. I think you just testified that
2 you were testing her math; is that right?

3 THE WITNESS: That's correct.

4 THE COURT: All right. And is that why it's in the
5 report?

6 THE WITNESS: Yes.

7 THE COURT: All right. Let's move on.

8 BY MR. BUCHANAN:

9 Q. Okay. So the question I have for you is did you
10 determine, like, for those who had 14 or more, how many of
11 those were business subscribers considering that they averaged
12 16 notices?

13 A. I didn't --

14 Q. Okay.

15 A. -- do that calculation to the best of my knowledge, no.

16 Q. So when we get to, like, 14, what percentage of 4,400 is
17 of 57,000?

18 So in other words, if you've calculated how many
19 subscribers had dropped off at this point were no longer
20 getting notices at the 14 level, is that about 90-some percent,
21 95 percent?

22 A. You're asking me to compute 4,400 divided by 57,600?

23 Q. Yes.

24 A. I don't have my phone or I would do it.

25 Q. Okay.

1 A. I can't do that -- I don't do arithmetic in my head
2 particularly with a microphone in my face.

3 Q. Okay. You could do -- 5,700 of 57,000 would be 10
4 percent, right?

5 A. In rough, round numbers, yeah.

6 Q. So that would be 90 percent. So 4,400 would be more like
7 93, 94 percent?

8 A. If you say so.

9 Q. Okay.

10 A. I don't doubt it.

11 MR. BUCHANAN: All right. We'd like to move this
12 into evidence, Your Honor.

13 THE COURT: All right. This exhibit with the
14 highlights is a new exhibit?

15 MR. BUCHANAN: This demonstrative.

16 THE COURT: Okay. Is there any objection?

17 MR. ZEBRAK: Well --

18 MR. BUCHANAN: It's their exhibit.

19 THE COURT: Yeah.

20 MR. ZEBRAK: It's fine, but is his entire set of
21 slides going into evidence?

22 MR. BUCHANAN: I'm just moving this one.

23 MR. ZEBRAK: Well, if we move it all into evidence,
24 we're fine with that, Your Honor.

25 THE COURT: Yeah. All right. I'll consider that.

1 We'll talk about that later.

2 MR. BUCHANAN: Okay. Could we go to the next slide?
3 Next one? Oh, go back to that one. Thanks. Sorry.

4 BY MR. BUCHANAN:

5 Q. These 13 terminated subscribers, they only relate to these
6 particular notices, right? They don't relate to other notices
7 that we got during the time period? In other words, you're
8 just talking about --

9 A. They refer to the ticket data that I have.

10 Q. Beyond this, beyond this 57,000 subscribers, you didn't
11 look at data beyond that to see how many terminated subscribers
12 there were for this period beyond these particular works in
13 suit or these particular subscribers, right?

14 A. These 13 are a subset of the 57,600, yes.

15 Q. All right. Can we go to the next slide, please?

16 So earlier -- you just -- when I was asking you about
17 the subscribers, business subscribers, and then you calculated
18 it here, right?

19 A. Yes.

20 Q. And is this Dr. Weber's number?

21 A. I don't know.

22 Q. Okay.

23 A. I don't know if she had -- I didn't -- these are my
24 numbers.

25 Q. Okay. Let's go to the -- so on this one, 17,729

1 subscribers had tickets for notices from other rights holders,
2 right? So, so how many, how many tickets are we talking about
3 from these other rights holders? Are we talking about one for
4 the 57,000, you've determined that there was at least one
5 ticket relating to another rights holder for the subscribers in
6 question?

7 A. For each of the 57,600 subscribers, I computed a variable,
8 yes or no. Yes, they had a notice corresponding to another
9 rights holder, or no, they did not have a notice from another
10 rights holders. And this is the proportion of yeses for that
11 calculation.

12 Q. So when you actually did the task that you were to do,
13 which was to determine how many -- during the claim period, how
14 many Cox subscribers received a notice from the plaintiffs for
15 a work in suit after receiving two others, that two others
16 could be -- both those two others could be from some third
17 party, right?

18 A. That's correct.

19 Q. Did you determine how many of the 57,000 received two out
20 of the three from somebody else, like, you know, Amazon, HBO,
21 Disney?

22 A. I did not perform that calculation.

23 Q. And did you determine when these notices regarding the
24 17,729, did they come in in 2012, '13, or '14?

25 A. I did not calculate that.

1 Q. And in terms of the notices that we talked about, did you
2 determine whether they were with regard to the same musical
3 composition or sound recording? Well, actually forget musical
4 composition. Sound recording. Did you determine whether any
5 of those -- how many came into the particular subscriber that
6 related to the same song or album?

7 A. I'm not sure I understand the question.

8 MR. BUCHANAN: Can we back up? Keep going. One
9 more. Thanks, James.

10 BY MR. BUCHANAN:

11 Q. So the people that got one or two, did you determine
12 whether it related to the same song or not?

13 A. I just counted tickets.

14 Q. Okay.

15 A. I did not look at the song.

16 Q. So the people that got three, they could have gotten -- it
17 could be all -- it could be a kid that downloaded a Disney
18 game, and the family got three notices for the same downloaded
19 game over three days, right?

20 A. I believe so.

21 MR. ZEBRAK: Your Honor --

22 THE WITNESS: I don't have -- I know what's in the
23 data. That's all.

24 THE COURT: Overruled. If you can answer.

25 THE WITNESS: Yes.

1 THE COURT: He's asking you about, you know --

2 THE WITNESS: I guess I don't have -- I can't -- I
3 don't have that information.

4 BY MR. BUCHANAN:

5 Q. So in the bigger numbers, like 13-plus and 14-plus, the
6 13, that can relate to an internet service provider that had a
7 subcontract with us and then had, you know, 100,000
8 subscribers, right?

9 A. All I know is what was in the data that I have. I don't
10 know what it could have been. I know what was in the data.

11 Q. Okay. So you didn't look behind the data to see if it was
12 a residential subscriber, a business subscriber, or what type
13 of business subscriber, right?

14 A. I did not.

15 Q. Okay.

16 James, can you -- okay.

17 So you've talked about report -- repeat infringing,
18 or repeat infringers. This shows that as you move along,
19 there's fewer and fewer people repeating, right?

20 A. That's correct.

21 Q. The more notices they get, the fewer additional notices?

22 A. That would always be true for data displayed in this way.

23 Q. And that's what Lynn Weber's data showed, right?

24 A. I don't recall.

25 Q. Okay. And I think, isn't it your view that -- I guess you

1 didn't look at it for the claims period, but do you recall when
2 I asked you in your deposition about isn't it true that over
3 time, that you had -- most people had one or two and then some
4 had three, some had four; it just sort of then decreased,
5 right?

6 A. That's correct.

7 MR. BUCHANAN: Okay. So could you go to the next
8 slide, please? Go down a couple. The next one, please, James.
9 Thank you.

10 BY MR. BUCHANAN:

11 Q. So here again, we're outside the claims period by one
12 month on one side and a year on the other side, right?

13 A. That's correct.

14 Q. And you think your counsel asked you to do that?

15 A. That's the data that I was given.

16 Q. Okay. And you were asked to do this, right? You didn't
17 do this on your own. You were told to do this, right?

18 A. I was told to do a repeat infringer analysis.

19 Q. So your 13,400, obviously, that number of the subscribers
20 that got tickets before the claim period, these are subscribers
21 that got a ticket during the claim period, at least one?

22 A. That's correct.

23 Q. Okay. So they got one during the period 2013 and '14, and
24 then you're saying they got at least one in 2012?

25 A. Or before February 1, 2013.

1 Q. Okay. So that's three. So do you know the -- you know,
2 what time period they received the three notices?

3 A. For a particular --

4 Q. Yeah.

5 A. -- subscriber?

6 I mean, I have that information. I didn't summarize
7 that or report it.

8 Q. Did you distinguish between a business subscriber or a
9 residential subscriber?

10 A. I did not in this analysis.

11 Q. So this would be about 80 percent of the subscribers in
12 question in this case got no notices -- or got no tickets in
13 the year 2012 in the month of January prior to the claims
14 period, right?

15 A. That's correct.

16 Q. So 80 percent for 13 months got no tickets, and that would
17 mean including a notice from the plaintiffs or any other rights
18 holder that sent a notice in?

19 A. You're using 80 percent as the complement of 23 percent?

20 Q. Yes. I know it's 77.

21 A. Yes. So yes.

22 Q. Okay.

23 Is there another slide here? We can move that.

24 So Cox -- are you aware that Cox had 4.5 million
25 subscribers?

1 A. No.

2 Q. Okay. You were here for the testimony of
3 Dr. Barbara Frederiksen-Cross, right?

4 A. I heard some of her testimony. I don't think I was here
5 for all of it.

6 Q. Did you hear when she said there were 30 million people on
7 BitTorrent and these other sites on a daily basis?

8 A. I don't recall storing that information.

9 Q. Okay. So you testified at the beginning of your direct
10 examination that you accepted all of the data that was given to
11 you on face value, right?

12 A. That's correct.

13 Q. You didn't look behind it, correct?

14 A. That's correct.

15 Q. So if it was unreliable, then your, your analysis or
16 conclusions would be unreliable, right?

17 A. My understanding is that the data -- that somebody else
18 was responsible for the reliability of the data. I was not
19 responsible for it.

20 Q. But the question was if that data turns out to be
21 incorrect or inaccurate and you relied on it, then that would
22 make your conclusions potentially inaccurate?

23 A. Yes.

24 MR. BUCHANAN: Okay. I have no further questions,
25 Your Honor.

1 THE COURT: All right. Thank you.

2 Redirect?

3 MR. ZEBRAK: Yes, Your Honor. Thank you.

4 Could you pull up the demonstratives, Mr. Duval?

5 REDIRECT EXAMINATION

6 BY MR. ZEBRAK:

7 Q. Let's first start, Dr. McCabe, with the time you spent
8 working on this matter. Would you describe this -- how would
9 you characterize the degree of how hard you worked on this
10 matter?

11 MR. BUCHANAN: Your Honor, I -- that's way beyond the
12 scope of cross.

13 THE COURT: Oh, no.

14 MR. BUCHANAN: Okay.

15 THE COURT: I'll permit it.

16 BY MR. ZEBRAK:

17 Q. Before the objection, sir, I asked you how would you
18 characterize how hard you worked on this matter?

19 A. I worked very often from early, very early in the morning
20 until late at night.

21 Q. Did you have to work at nights?

22 A. Yes.

23 Q. Weekends?

24 A. Yes.

25 Q. Did you have to travel?

1 A. Limited travel, yeah.

2 Q. When you arrived here to testify this week, did you know
3 exactly what day you would have to testify?

4 A. I did not.

5 Q. Did you know how long plaintiffs' counsel or Cox's counsel
6 would take questioning witnesses?

7 A. I did not.

8 Q. Do you enjoy being away from your family for this matter?

9 THE COURT: All right, let's move on. This is
10 beyond -- I thought you were going to ask what he did during
11 the 100 or more hours that he worked on the case, and this is
12 outside of that. So let's move on.

13 MR. ZEBRAK: Yes, Your Honor. I'll move on.

14 BY MR ZEBRAK:

15 Q. Counsel asked you questions about the mechanics of the
16 preparation of your report. Do you recall that?

17 A. Yes.

18 Q. Asked you questions about who typed particular words or
19 footnotes going from your outline and revisions? Do you recall
20 that?

21 A. I recall the questions.

22 Q. Whose work product is reflected in that report?

23 A. It's my report.

24 Q. Do you stand behind that work product?

25 A. I do.

1 Q. Does anything from counsel's questions today cause you to
2 doubt the accuracy and reliability of your findings?

3 A. No.

4 Q. Now, I'm going to ask you not just about your reports but
5 about -- let's start with your demonstrative slides. Does
6 anything from counsel's questions today cause you to doubt the
7 accuracy and reliability of those slides?

8 A. No.

9 Q. Does anything from counsel's questions today cause you to
10 doubt the accuracy and reliability of the testimony you've
11 given?

12 A. No.

13 Q. Now, let me ask you some other questions. Counsel asked
14 you a series of fast questions about several pages of your
15 deposition testimony, and I believe they, they concerned
16 warnings. Do you recall that -- those questions?

17 MR. BUCHANAN: I'm going to object to that.

18 THE COURT: Warnings?

19 MR. ZEBRAK: Well, I'm framing the question, Your
20 Honor.

21 THE COURT: Well, you're testifying. Ask him --

22 MR. ZEBRAK: Yes, Your Honor.

23 THE COURT: -- whether he agrees or disagrees with
24 something that was brought to his attention.

25 MR. ZEBRAK: Sure.

1 BY MR ZEBRAK:

2 Q. I'd like to bring your attention, sir, to your deposition
3 testimony that counsel referred you to, at page 188 to 191.
4 I'd like to just remind yourself what he was questioning you
5 about. I'm going to ask a follow-up question.

6 MR. BUCHANAN: Your Honor, this is improper.

7 THE COURT: No, I think he's asking whether he would
8 like to further explain questions -- whether to further -- he
9 would like to amplify his answer to questions you asked on
10 direct where he was limited.

11 Is that right?

12 MR. ZEBRAK: That's exactly what I'm doing, Your
13 Honor. I'd like to give the witness an opportunity to look at
14 those pages so he understands the subject matter of the
15 questions from Cox's counsel, and I'm going to follow up.

16 THE COURT: Where do you want him to read?

17 MR. ZEBRAK: Oh, it was page -- I had done that
18 before the objection. It was --

19 THE COURT: 188 to 191?

20 MR. ZEBRAK: Yes, sir.

21 THE COURT: All right. Please review those pages,
22 Dr. McCabe.

23 THE WITNESS: Yes, I'm familiar with those pages.

24 BY MR. ZEBRAK:

25 Q. Are you familiar with what the phrase "sent warning"

1 refers to?

2 A. Not in fine detail.

3 Q. Does anything about your demonstrative slides today
4 address warnings?

5 A. It does not.

6 Q. Did anything about your testimony on direct involve a
7 calculation of the number of warnings Cox sent to customers?

8 A. I don't believe so.

9 Q. Now, I want to bring up one of your demonstrative slides,
10 sir. So we're back in the repeat infringer analysis. This is
11 the who, the repeat infringers, correct?

12 A. Correct.

13 Q. Okay. Now, the source of the information for this
14 analysis are whose records?

15 A. The --

16 MR. BUCHANAN: Your Honor, I'm going to object. He
17 asked -- asked and answered on direct, so I never asked
18 anything about it.

19 THE COURT: You asked lots of questions of where --
20 of the dates of the data and what the data represented, so I
21 think it falls within redirect. Ask your question.

22 MR. ZEBRAK: Thank you, Your Honor. I was just
23 framing the question to follow so it had some context before
24 the objection.

25 THE COURT: Go ahead.

1 BY MR. ZEBRAK:

2 Q. Let me start again. Whose records are you analyzing with
3 respect to repeat infringers?

4 A. This is the Cox ticket data.

5 Q. And these are ticket records concerning -- that stem from
6 copyright infringement notices, correct?

7 A. That's right.

8 Q. Okay. Now, do you know for what years Cox produced ticket
9 data for the 57,600 subscribers who were the subject of
10 MarkMonitor's notices?

11 A. The framework is the years 2012, '13, and '14.

12 Q. Now, do you know if -- do you know whether Cox produced
13 ticket data for 2009 in this litigation?

14 A. I have not seen any data from 2009.

15 Q. Do you know if Cox produced ticket data for 2010 in this
16 litigation?

17 A. I have not seen that.

18 Q. Do you know if Cox produced ticket data for 2011 for that
19 year?

20 A. I don't know.

21 Q. If that information existed, would that be something -- do
22 you have an objection?

23 THE COURT: Go ahead.

24 BY MR. ZEBRAK:

25 Q. If that information existed, would that be something that

1 you would include in a repeat infringer analysis to bring above
2 the fold what copyright infringement tickets Cox received for
3 the subscribers reported by MarkMonitor's notices in the claim
4 period?

5 MR. BUCHANAN: Objection, Your Honor.

6 THE COURT: Yes, sustained.

7 MR. BUCHANAN: Pure speculation.

8 THE COURT: Sustained. Let's move on.

9 MR. BUCHANAN: And just for -- if I may, I would also
10 object because the Court is the one that provided what data
11 would be produced, and so I don't want to testify, but he's
12 suggesting that somehow --

13 THE COURT: Understood. Let's go. That's why I
14 think it's an improper line of questioning. So let's move
15 along.

16 BY MR. ZEBRAK:

17 Q. As a statistician, do you choose to discard data that may
18 be relevant to your analysis?

19 A. No. I'm very sensitive about doing the best that I can
20 with all of the data that's available to me, no matter what the
21 circumstances.

22 MR. ZEBRAK: Thank you, Your Honor. No further
23 questions.

24 THE COURT: All right. May Dr. McCabe be excused?

25 All right. You're excused with our thanks,

1 Dr. McCabe. Please don't discuss the testimony you've given
2 with anyone until our trial is over. All right?

3 THE WITNESS: Thank you, yes.

4 THE COURT: All right. Thank you, sir. Have a good
5 afternoon.

6 WITNESS EXCUSED

7 THE COURT: All right. We're going to take our
8 mid-afternoon break. We'll take 15 minutes and we'll come back
9 and we'll be, we'll be adjourning at 5 p.m. All right?

10 So you're excused. Thank you.

11 NOTE: At this point, the jury leaves the courtroom;
12 whereupon, the case continues as follows:

13 JURY OUT

14 THE COURT: All right. Why don't you-all discuss
15 what you want to do with demonstratives now that Mr. Buchanan
16 made the motion to admit one of the slides. As you all know,
17 jurors are always interested in the demonstratives, so discuss
18 that at break and see if you can resolve that, and then we'll
19 talk about it when we come back.

20 Anything else before we break? Where are we on --
21 are we playing a deposition now?

22 MR. OPPENHEIM: We're going to call Linda Trickey
23 next, Your Honor. Frankly, we didn't think we were going to go
24 so long with Dr. McCabe.

25 THE COURT: Okay.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

VOLUME 11 (A.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 THE COURT: Well, they identify -- beginning back on
2 28, where it's an SR plaintiff and then MC plaintiff and SR 1
3 and MC 1, I'm not sure what those figures -- so he does
4 identify works which contain both an SR and an MC, right, in 29
5 and --

6 MR. OPPENHEIM: There is one individual example or
7 two individual examples --

8 THE COURT: 30, 34.

9 MR. OPPENHEIM: -- and now they want to claim that
10 because he referenced that in the context of a discussion about
11 notices, that now because he references a couple of examples,
12 that he gets to put in something that he did no analysis for?
13 Yesterday, they were saying, look at Schedule 6.

14 We looked at Schedule 6. It's not what it is.

15 And now they're saying, oh, no, no, no. Let's try
16 this.

17 Your Honor, this is exactly what isn't supposed to
18 happen. You've been -- you've restricted the plaintiffs to
19 presenting their experts, constrained by the reports and their
20 testimony. The rules should apply equally. It's -- this
21 analysis is not here.

22 And the fact that it's an ever-moving target of
23 numbers, I mean, Mr. Buchanan said, you know: We fly-spec'd it
24 last night.

25 That analysis was not done at the time of his report.

1 That's the question, was the analysis done at the time of his
2 report, and the answer is no.

3 THE COURT: All right. All right. The motion to
4 preclude the exhibits which contain the lower portions of 13
5 and 21, 22, 23, 26, and the last two, the motion is granted.
6 Those will be amended -- or not presented. I find that the --
7 in going over the reports, and in particular, the pages that
8 defendants have pointed to, that the analysis was not done.
9 There has been no notice that Mr. Tregillis was going to
10 testify about those matters.

11 This is clearly outside of the report, the summaries
12 that he gave of what his testimony was going to be, and
13 although they're not, as Mr. Buchanan pointed out, the most
14 resounding modifications, they are modifications, and they do
15 change the dynamics of his report, and that's -- it's
16 impermissible to do that this late in the -- on the last day of
17 trial. So the motion is granted to just -- those will be --
18 exhibits will either be redacted or they won't be used.

19 All right. What else do we have this morning?

20 MR. OPPENHEIM: I don't think anything else at the
21 moment, Your Honor.

22 THE COURT: Okay. All right. What -- does that --
23 who is -- Tregillis is the next witness? Is that --

24 MR. ELKIN: No, Your Honor. We're calling
25 Mr. Mencher.

1 THE COURT: Okay. All right. Are we ready for our
2 jury then?

3 MR. ELKIN: Yes, Your Honor.

4 THE COURT: All right. Joe, let's get our jury,
5 please.

6 THE COURT SECURITY OFFICER: Yes, sir.

7 NOTE: At this point, the jury returns to the
8 courtroom; whereupon, the case continues as follows:

9 JURY IN

10 THE COURT: All right. Good morning, ladies and --
11 please have a seat, everyone. Sorry again for the delay.
12 Hopefully you were comfortable.

13 Thank you for coming in on time, and please give me
14 that nod of heads that you didn't do any research or
15 investigation or talk to anybody.

16 NOTE: All jurors nodding heads.

17 THE COURT: Thank you, sir. Thank you-all.
18 All right. Next witness?

19 MR. ELKIN: Thank you, Your Honor. The defendants
20 call Sanford Mencher.

21 THE COURT: All right.

22 SANFORD MENCHER, DEFENDANTS' WITNESS, SWORN

23 MR. ELKIN: May I inquire?

24 THE COURT: Yes. Good morning, sir.
25 Please proceed, Mr. Elkin.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

-----: :
SONY MUSIC ENTERTAINMENT, et al.,: :
Plaintiffs, : :
-vs- : Case No. 1:18-cv-950
COX COMMUNICATIONS, INC., et al.,: :
Defendants. : :
-----: :

VOLUME 11 (P.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

1 Q. Okay. So if Cox has -- and its people there, management
2 and the people on the ground dealing with the calls and the
3 e-mails, have developed a system based on what they see on the
4 ground and what they hear from people, you would -- wouldn't
5 you believe that that would be part of the process, that that
6 should be considered in making a determination when to set a
7 certain point in time where someone should be terminated?

8 A. Again, looking at that as Cox's policy and process, it is
9 a step that I have seen in other similar types of processes
10 where complaints have been remediated in some way, shape, or
11 form. I had that in the cellular world with my customer
12 service report. So in my experience, I've had consumer
13 interaction in remediation efforts underway in various
14 environments. Again, you know, Cox has its policy and
15 procedures. I've had my policy and procedures.

16 MR. BUCHANAN: No further questions.

17 THE WITNESS: Thank you, sir.

18 THE COURT: All right. Redirect?

19 MR. ZEBRAK: No, thank you, Your Honor.

20 THE COURT: Okay. All right, thank you. You're
21 excused at this time. Have a good afternoon.

22 THE WITNESS: Thank you, sir. Thank you, Your
23 Honor.

24 NOTE: The witness stood down.

25 MR. OPPENHEIM: With that, Your Honor, plaintiffs

1 rest their rebuttal case.

2 THE COURT: All right. All right, that concludes
3 the evidence in the case. We have a couple of matters to talk
4 about, and I'll be able to give you word about whether we're
5 going to try and get in the closing arguments tonight or first
6 thing in the morning and just do part of the, the legal
7 instructions tonight.

8 I understand that some, some of you would like to
9 finish at 5:30, and I think if we try and do the entire
10 closing arguments and the instructions on the law, we're
11 looking at, we're looking at 6:30 or so, so that -- let me
12 finish up what we need to finish up, and then I'll ask Joe to
13 come in and we'll ask you whether you want to just do part of
14 it, as in the legal instructions tonight, and have closings
15 tomorrow, or you want to finish everything tonight.

16 So give us a little chance to finish up a few items,
17 and we'll check back with you shortly. Thank you. You're
18 excused.

19 NOTE: At this point, the jury leaves the courtroom;
20 whereupon, the case continues as follows:

21 JURY OUT

22 THE COURT: All right. Have a seat. I have two
23 issues that I want to raise on the jury instructions. One is
24 whether there's been any evidence, evidence of mitigation that
25 the jury could consider, and second, whether there has been

1 any evidence that the jury could consider whether to give one
2 statutory damages award for the works that include a song and
3 the music composition.

4 So, Mr. Elkin, tell me, where are you there, sir?

5 MR. ELKIN: Sure. Any particular order?

6 THE COURT: Either one. It doesn't matter.

7 MR. ELKIN: So at sidebar, as Your Honor knows, I
8 took the Court through a proffer of both the sound recording
9 and the music composition --

10 THE COURT: A couple instances of that, yeah.

11 MR. ELKIN: Right, the 504(c)(1).

12 I believe that there is -- the registrations having
13 been provisionally admitted, and there are other documents
14 that reference those registrations as well that have been in
15 evidence, could give the jury with instructions the ability to
16 identify the limitations with respect to the compilations and
17 derivative works.

18 With regard to the sound recording compilation
19 issue, the -- on the face of the certificates are, one can
20 identify the specific, you know, works, and to the extent that
21 they're part of a compilation, I believe that is sufficient
22 evidence clearly that I think under the, the copyright
23 statute, I believe Article IV gives copyright claim, it's the
24 ability to proffer to the U.S. Copyright Office certificates
25 of registration for collective works and additions.

1 Under Section 101, the definition under the
2 copyright statutes, collective works are defined as
3 compilations, and so I think there's an adequate basis for
4 that, and I showed Your Honor an exemplar at sidebar.

5 With respect to the -- and, of course, look, the --
6 examining the evidence, and I don't want to sit here and get
7 in over my skis, but based on the transcripts that we've
8 reviewed, the only evidence that came in, even if one were to
9 consider independent economic value, even if that were
10 something that would be considered in the circumstances, once
11 you have the facial evidence from the certificates of
12 registration, there is nothing that the, that the plaintiffs
13 have come up with other than a couple of very vague lines in
14 Mr. Kooker's testimony with respect to the Sony. I don't
15 think anything could remotely be identified as something that
16 would rise to that level.

17 On the mitigation issue, I would take Your Honor
18 through the following. And this is sort of consistent with
19 the order, I believe, that the Court rendered with regard to
20 the affirmative defenses and specifically with respect to
21 mitigation. I believe what Your Honor had stated in the
22 decision is that there could be evidence that the plaintiffs
23 could have taken actions such as filing of lawsuits against
24 the subscribers that they believed should have been terminated
25 or something that Cox should have done about.

1 copyright issues. The defendants could have presented
2 evidence on it. They chose not to. I don't believe giving an
3 instruction to the jury on those issues right now will leave
4 the jury with any sense what to do with them because they have
5 nothing in front of them to understand what they mean.

6 THE COURT: All right. Mr. Elkin?

7 MR. ELKIN: Thank you, Your Honor. I'll be brief.
8 There was a reference to last night's charging conference, and
9 I think Mr. Oppenheim just doubled down on this notion of
10 joint tortfeasors. This is not a situation where Cox and the
11 subscribers are jointly being pursued for direct infringement.
12 There's a different standard for secondary infringement.

13 It then -- what the standard is for direct
14 infringement, I'm not going to -- Your Honor knows the
15 additional requirements, so he's really comparing apples to
16 oranges.

17 I don't want to repeat and rehash the same
18 arguments. I think you have it. I just -- I do think in the
19 circumstances, we did not question Mr. Tregillis on the issues
20 about which you instructed us not to. The notion that somehow
21 his testimony could be used against us when we were precluded
22 from producing the information is ironic, but I just harken
23 back to the argument that I made with regard to the
24 certificates. I didn't think that Your Honor had precluded
25 the certificates to be a bar to -- for us to pursue this. It

1 had to do more with the bar to using it in the case, and we
2 declined, of course, and pursuant to Your Honor's order, did
3 not even go there.

4 THE COURT: Well, I make rulings on individual
5 pieces of evidence, and you-all map out how you want to put
6 your case on, what witnesses you want to put in, and what
7 testimony you believe is appropriate and admissible, and then
8 I look at the end of the case to see what's there and what's
9 not there, and so I -- and when you have experts testifying,
10 as I've demonstrated, I think they should be held to the
11 confines of their reports. They get, you know, rebuttal
12 reports. They get beginning reports, rebuttal, surrebuttal
13 reports. There shouldn't be any surprises. So the
14 limitations I've imposed on expert testimony is based on, on
15 the notice requirements under Rule 26.

16 And the registrations, obviously, we looked at them
17 at the issue when it was, when it was initially offered on
18 summary judgment and ownership and registration issues, and
19 then it comes up again yesterday with these 7,200, which
20 there's just no testimony as to what's in that pile.

21 And so to now somehow expect the jury to pluck out
22 the works that are both sound recordings and music
23 compositions or allow you to, I guess, in closing arguments
24 just say, listen, there's 4,000 of these or 3,000 of these are
25 both one and the other, that, I think, is improper.

1 I expected that there would be testimony about how
2 many of these sound recordings were also music compositions,
3 and the jury would be -- would have that evidence through the
4 witness stand when they were deliberating.

5 I mean, it's a close issue even to begin with as to
6 whether in this day and age, when the courts have clearly been
7 looking at the independent value of the works versus whether
8 they're music compositions and sound recordings, and I'm not
9 sure that Mr. Oppenheim isn't correct that we shouldn't even
10 be looking at the traditional Second Circuit analysis that
11 you've cited and is one of the governing cases, but I just
12 don't see that there's evidence from which they could collect
13 and cull and determine whether they wanted to combine the
14 statutory damages award for those works that are -- contained
15 both sound recordings and music compositions.

16 So I'm going to find that they should be allowed to
17 deliberate on the 10,017 individual works, regardless of
18 whether they're compositions or sound recordings, and your
19 exception, of course, is noted.

20 The other issue on mitigation, you know, I didn't
21 know how that would go in the course of the trial, but, you
22 know, clearly we had the instruction that I gave in BMG
23 talking about the -- that the mitigation instruction included
24 both that plaintiffs had failed to use reasonable efforts to
25 mitigate damages and also that the amount by which damages

1 would have been mitigated, and there's absolutely an absence
2 of any evidentiary testimony about, you know, how they would
3 look at that.

4 I mean, the worst of the worst -- that's no standard
5 from which they could say, okay, there is -- and there's no
6 testimony about who are the worst of the worst. I mean, there
7 are a couple of isolated occasions where there were a hundred
8 or more or a thousand for business customers where the
9 testimony was about, but that's not a standard that they could
10 look at and reasonably deliberate on, on where's that line
11 drawn.

12 So I'm not going to give the mitigation instruction,
13 either, and again, your exception is noted. I don't find that
14 the evidence -- you know, there is the Trickey testimony.
15 There was the John Doe lawsuits, and so that evidence is out
16 there, but when you compare that to what the jury would be
17 asked to deliberate, and I think that mitigation instruction
18 is the correct instruction to give to the jury, I find that
19 none of that evidence weighs on those issues.

20 So again, your exception is noted.

21 MR. ELKIN: I understand, Your Honor. May I just
22 clarify two issues on Your Honor's last ruling?

23 THE COURT: Yes, sir.

24 MR. ELKIN: One is with regard to the mitigation,
25 just to be clear, I don't know this is going to alter Your